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APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, et al., DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA,
Appellants,

vs.

ORRIN W. FOX CO., et al.,
Appellees.

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, et al.,
Appellants,

vs.

ORRIN W. FOX CO., et al.,
Appellees.

On Appeal from the United States District Court for the Central District of California

Jurisdictional Statement Filed December 6, 1977 10-12,

Probable Jurisdiction Noted and Cases Consolidated February 21, 1978

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A BOWNE COMPANY

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United States District Court
Central District of California

No. 76 1200 LTL

Orrin W. Fox Co., a corporation, Muller Chevrolet, a corporation, and General Motors Corporation,

Plaintiffs,

vs.

New Motor Vehicle Board of the State of California; Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg, as members of the New Motor Vehicle Board; Sam W. Jennings, as Executive Secretary of the New Motor Vehicle Board; Department of Motor Vehicles of the State of California; and Herman Sillas, as Director of the Department of Motor Vehicles,

Defendants.

[Filed Apr. 13, 1976]

COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION

(Three-Judge Court)

Plaintiffs Orrin W. Fox Co., Muller Chevrolet and General Motors Corporation, for claims for relief, allege the following:

NATURE OF THE CASE

1. This is an action to declare unconstitutional and void and to enjoin the enforcement of Sections 3060 through 3069 inclusive of the Vehicle Code of the State of California, hereafter referred to as the "Automobile Franchise Act" or the "Act." The Automobile Franchise Act was enacted by the California Legislature as Stats. 1973, Ch. 996 § 16, as amended by Stats. 1974, Ch. 384 § 3, was approved by the Governor on October 1, 1973, and became effective on July 1, 1974. The Act is unconstitutional both on its face and as administered.

2. Notwithstanding the terms of any franchise agreement, the Automobile Franchise Act purports to regulate the termination or modification of franchise agreements between motor vehicle manufacturers and motor vehicle dealers, as well as the establishment of newly franchised motor vehicle dealerships and the relocation of existing franchised motor vehicle dealerships. In general, the Act requires manufacturers to give the New Motor Vehicle Board (hereafter the "Board") and franchisees of the "same line-make" located within a ten-mile radius of the affected dealership written advance notice of intent to do any of these acts (with the exception of termination where notice only to the terminated dealer and the Board is required). Within a stated period of time after receiving such a notice, a franchisee may protest the proposed action to the Board. If a protest is filed, the Board is required by statute automatically and without hearing to issue an order enjoining the pro-

posed action until such time as a hearing on the merits of the protest has been had and a final determination has been made. In practice such injunction orders are made by the Executive Secretary of the Board as a matter of course and, because of the Board's position that it has complete discretion as to the time within which it must set matters for hearing, either before the Board or a hearing officer designated by the Board, the injunctive orders are of indefinite duration. The conduct of the hearing on the merits, rendition of the Board's decision and appellate review thereof are governed by other provisions of the Act. Various of the Act's provisions are described in greater detail in succeeding sections of this Complaint, and a copy of the Act as presently in force is attached hereto as Exhibit A for the Court's convenience.

3. The Automobile Franchise Act is unconstitutional for the following reasons, each of which will be described in greater detail in succeeding sections of this Complaint:

(a) The Automobile Franchise Act does not afford manufacturers a hearing before an impartial tribunal and therefore violates the Due Process and Equal Protection Clauses (Section 1) of the Fourteenth Amendment to the United States Constitution.

(b) The New Motor Vehicle Board's enjoining of the described proposed action by manufacturers and their existing and potential franchisees without the opportunity for a prompt

hearing and decision on the merits of dealer protests and without requiring any showing of good cause on the part of the protesting dealer prior to the issuance of injunctive orders deprives manufacturers and their existing and potential franchisees of property and protected constitutional rights without due process of law, in violation of the Fourteenth Amendment.

(c) Under the Act, as administered, there is a significant and protracted period of delay between the time of the initial filing of a protest, followed automatically by the injunctive action of the Board, and any subsequent hearing and final decision on the merits, which results in a denial of property and protected constitutional rights of manufacturers and their existing and potential franchisees without due process of law, in violation of the Fourteenth Amendment.

(d) The Automobile Franchise Act is inconsistent with and in direct contravention of the national economic policy reflected in the federal antitrust laws (15 U.S.C. §§ 1-7, 12-27), and is therefore invalid under the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

(e) Under the Act, existing and potential franchisees whose interests are directly affected by the Board's injunctive order are denied the right to participate in protest proceedings involving the establishment or relocation of their franchises, and are denied the opportunity to be

heard and present evidence on their own behalf. The Automobile Franchise Act therefore violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(f) The Automobile Franchise Act denies both due process and equal protection of the law in violation of the Fourteenth Amendment since there is no compelling state interest sufficient to justify the Act's impact on constitutionally protected rights.

(g) To the extent that its provisions purport to apply to franchises already in existence on the date of its enactment, the Automobile Franchise Act impairs the obligation of contracts in violation of the Contracts Clause of the United States Constitution (Article I, Section 10).

(h) The Automobile Franchise Act imposes an undue burden on interstate commerce and thereby conflicts with federal power under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) to regulate such commerce.

JURISDICTION AND VENUE

4. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331(a), 1337 and 1343(3). The matter in controversy exceeds $10,000.00, exclusive of interest and costs. This action presents an actual case or controversy appropriate for declaratory relief pursuant to 28 U.S.C. § 2201.

5. This action seeks injunctive relief against the enforcement of a state statute on the ground that it is unconstitutional, and therefore the action must be heard and determined by a three-judge court pursuant to 28 U.S.C. § 2281.

6. The venue of this action is in the Central District of California pursuant to 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiff Orrin W. Fox Co. (hereafter "Fox") is a California corporation doing business as a dealer for new and used automobiles and trucks at 3456 East Colorado Boulevard, Pasadena, California. Fox holds franchises from American Motors Sales Corporation for American Motors automobiles and from the GMC Truck & Coach Division of General Motors Corporation for the full line of GMC trucks. Fox is a "franchisee" and "new car dealer" within the meaning of California Vehicle Code, Sections 331.1 and 426, respectively.

8. Plaintiff Muller Chevrolet (hereafter "Muller") is a California corporation doing business as a dealer for new and used automobiles and trucks at 3701 Oceanview Boulevard, Montrose, California. Muller holds a franchise from the Chevrolet Division of General Motors for Chevrolet automobiles and trucks. Muller is a "franchisee" and "new car dealer" within the meaning of California Vehicle Code, Sections 331.1 and 426, respectively.

9. Plaintiff General Motors Corporation is a Delaware corporation with its principal place of business

in Michigan. General Motors manufactures and sells motor vehicles and motor vehicle parts and accessories throughout the United States. These products are manufactured and assembled in various parts of the United States and in large part are sold and shipped by General Motors in interstate commerce throughout the United States, including states other than the state of manufacture. In the Central District of California, General Motors operates motor vehicle assembly plants in Van Nuys and South Gate, California, and General Motors sells motor vehicles and motor vehicle parts and accessories to numerous franchised dealers which are themselves located and doing business in the Central District. General Motors is a "franchisor" and "manufacturer" within the meaning of California Vehicle Code §§ 331.2 and 388, respectively.

10. Defendant New Motor Vehicle Board is an agency of the State of California, within the Department of Motor Vehicles. The Board is, *inter alia*, charged with the responsibility for administering the Automobile Franchise Act pursuant to § 3050(b) of the California Vehicle Code. Defendants Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg are the current, duly-appointed members of the Board and are sued herein in that capacity. Three seats on the Board are now vacant. Defendant Sam W. Jennings is and at all times material hereto has been the Executive Secretary of the Board and is sued herein in that capacity.

11. Defendant Department of Motor Vehicles (hereafter "Department") is an agency of the State

of California, within the Business and Transportation Agency. Defendant Herman Sillas is the current Director of the Department and is sued herein in that capacity. The Department and the Director are charged with the responsibility of administering and enforcing the provisions of the California Vehicle Code.

RELATED ADMINISTRATIVE PROCEEDINGS

12. General Motors is currently a party to the following Automobile Franchise Act proceedings pending before the New Motor Vehicle Board:

(a) *Becherer Buick, Inc. v. Buick Motor Division, General Motors Corporation* (Protest Nos. PR-35-75 and PR-50-75), filed on or about May 22, 1975 and August 6, 1975, respectively.

(b) *O'Donnell Buick-Opel, Inc. v. Buick Motor Division, General Motors Corporation* (Protest Nos. PR-36-75 and PR-51-75), filed on or about May 22, 1975 and August 6, 1975, respectively.

(c) *Service Oldsmobile-GMC, Inc., et al. v. General Motors Corporation (Oldsmobile Division, Truck & Coach Division)* (Protest No. PR-37-75), filed on or about May 16, 1975.

(d) *Jack Wall Chevrolet, Inc. v. Chevrolet Motor Division, General Motors Corporation* (Protest No. PR-87-76), filed on or about January 22, 1976.

(e) *Fred Bell Chevrolet v. Chevrolet Motor Division, General Motors Corporation* (Protest

No. PR-88-76), filed on or about January 21, 1976.

13. The *Becherer Buick* and *O'Donnell Buick-Opel* cases (hereafter collectively referred to as the "Pasadena Cases") are protests by franchised Buick-Opel dealers located in Monrovia and San Gabriel, California, respectively, against the granting of Buick and Opel franchises to plaintiff Fox in Pasadena. Although Fox is not a party to the Pasadena Cases (because the Automobile Franchise Act contains no provision for participation in protest proceedings by potential franchisees), Fox's economic and commercial interests are directly affected by those proceedings.

14. The Pasadena Cases arose in the following manner: In March 1974 Buick's franchised dealer in Pasadena, Walter Klock Buick, went out of business following personal and financial difficulties. General Motors immediately began to seek a replacement dealer and ultimately decided to offer Buick and Opel franchises to Fox. Since the Fox dealership was to be a replacement for Walter Klock Buick and not an additional dealership, and since Section 3062 of the California Vehicle Code had not at that time been construed by the New Motor Vehicle Board or any court, General Motors wrote the Board to advise of its intention to grant Buick and Opel franchises to Fox, and to ask if Buick-Opel dealers within 10 miles of the Fox dealership should be given notice under Section 3062. The Board declined to answer this inquiry. Without further notice, General Motors and

Fox entered into franchise agreements for Buick and Opel automobiles on May 2, 1975, and Fox commenced the sale of Buick and Opel automobiles. Thereafter, Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc. filed protests with the New Motor Vehicle Board against the granting of Buick and Opel franchises to Fox. (Copies of protest letters are annexed hereto as Exhibits B and C.) By letters dated May 29, 1975 the Board ordered General Motors not to grant Buick and Opel franchises to Fox and enjoined General Motors and Fox from engaging in the business contemplated by the franchises pending a hearing on and determination of those protests. (Copies of the Board's injunction letters are annexed hereto as Exhibits D and E.)

15. Both General Motors and Fox were advised by the Department of Motor Vehicles that any violation of the Board's injunctive orders would result in disciplinary action by the Department which could include the suspension or revocation of General Motors' license to do business as a motor vehicle manufacturer in California and Fox's license to do business as a new and used car and truck dealer. (A copy of the Department's letter to Fox is annexed hereto as Exhibit F.) Under the threat of such disciplinary action General Motors immediately ceased to supply Buick and Opel automobiles to Fox, and Fox immediately ceased the sale of such automobiles. Despite vigorous efforts by General Motors during the past year to bring the Pasadena Cases to a hearing before the New Motor Vehicle Board, no hearing has been held and none is now scheduled.

16. The *Service Oldsmobile-GMC, Inc.* case is a protest against the termination of Service Oldsmobile's franchises from General Motors for the sale of Oldsmobile cars and GMC trucks and motor homes at a dealership located at 3555 East South Street, Long Beach, California. Service Oldsmobile became insolvent and went out of business in February 1975. Because of this, in April 1975 General Motors served notice of franchise termination on Service Oldsmobile. Despite the fact it was no longer in business, Service Oldsmobile protested the termination of its franchises to the New Motor Vehicle Board, and by letter dated May 23, 1975 the Board ordered General Motors not to terminate those franchises pending a hearing on and determination of Service Oldsmobile's protest. (Copies of the protest letter and the Board's injunction letter are annexed hereto as Exhibits G and H.) A hearing before a hearing officer designated by the Board has been scheduled in Los Angeles for June 14-18, 1976.

17. The *Jack Wall Chevrolet, Inc.* and *Fred Bell Chevrolet* cases (hereinafter collectively referred to as the "La Canada Cases") are protests by franchised Chevrolet dealers located in Pasadena and Tujunga, California, respectively, against the relocation of Muller Chevrolet from 3701 Oceanview Boulevard, Montrose, California to 475 Foothill Boulevard, La Canada, California. Although Muller is not a party to the La Canada cases (because the Automobile Franchise Act contains no provision for participation in protest proceedings by the relocating franchisee),

Muller's economic and commercial interests are directly affected by those proceedings. In January 1976, General Motors gave notice of the proposed relocation of Muller Chevrolet to the New Motor Vehicle Board and all existing Chevrolet franchisees located within 10 miles of 475 Foothill Boulevard in La Canada. Jack Wall Chevrolet, Inc. and Fred Bell Chevrolet filed protests with the New Motor Vehicle Board, and by letters dated February 6, 1976 the New Motor Vehicle Board ordered General Motors not to go forward with the proposed relocation pending a hearing on and determination of the Bell and Wall protests. (Copies of the protest and injunction letters are annexed hereto as Exhibits I, J, K and L.) A hearing before a hearing officer designated by the Board has been scheduled in Los Angeles for June 21-25, 1976.

FAILURE TO PROVIDE IMPARTIAL TRIBUNAL

18. The Automobile Franchise Act does not afford motor vehicle manufacturers a hearing before an impartial tribunal, and therefore violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

19. The composition of the New Motor Vehicle Board is established by Vehicle Code § 3000, which provides that the Board shall consist of nine members, and Vehicle Code § 3001, which states:

> "Four of the appointive members of the board shall be new car dealers as defined in Section 426 who have engaged for a period of not less than five years preceding their appointment in [the motor vehicle business]. Such members shall be appointed by the Governor.
>
> Each of the five remaining appointive members shall be a public member who is not [engaged in the motor vehicle business in any capacity] at the time of such appointment and one of such five appointive members shall have been admitted to practice law in the state for at least 10 years immediately preceding his appointment. One public member shall be appointed by the Senate Rules Committee, one by the Speaker of the Assembly, and three by the Governor.
>
> Each member shall be of good moral character."

20. When the protests in the Pasadena Cases were first filed (May 22, 1975) and the Board issued its order prohibiting General Motors from granting Buick and Opel franchises to Fox (May 29, 1975) the Board was composed of the following duly-appointed members:

> Robert A. Smith, a new car dealer and franchisee doing business as Bob Smith VW-Porsche at 1750 North Cahuenga Boulevard, Hollywood, California.
>
> Pascal B. Dilday, a new car dealer and franchisee doing business as Pascal Dilday Lincoln-Mercury at 1276 University Avenue, San Diego, California.
>
> John D. Barnes, a new car dealer and franchisee doing business as Jack Barnes Pontiac at 999 North Oxnard Boulevard, Oxnard, California.

John B. Vandenberg, a new car dealer and franchisee doing business as Vandenberg Motors, 1125 Alhambra Boulevard, Sacramento, California.

Melicio H. Jacaban, a newspaper publisher.

Audrey B. Jones, an attorney.

John Onesian, an attorney.

Winfield J. Tuttle, retired.

Thomas Kallay, an attorney.

21. The terms of office of Board members Kallay, Smith and Dilday expired on January 15, 1975, and those members ceased to hold office on July 15, 1975 pursuant to Vehicle Code § 3003. No successor members have been appointed.

22. The New Motor Vehicle Board as constituted prior to July 15, 1975 and at all times material hereto was not and is not an impartial tribunal. Each member of the Board who is also a new car dealer and franchisee has a direct pecuniary interest in the outcome of Automobile Franchise Act protest proceedings before the Board. The Board's decision in such cases will create statewide standards governing the establishment, relocation, modification and termination of motor vehicle franchises, including the franchises held by dealer members of the Board.

FAILURE TO AFFORD PROMPT HEARING

23. The New Motor Vehicle Board's enjoining of the described proposed action by manufacturers and

their existing and potential franchisees without the opportunity for a prompt hearing on the merits of dealer protests and without requiring any showing of good cause on the part of the protesting dealer prior to the issuance of injunctive orders deprives manufacturers and their existing and potential franchisees of property and protected constitutional rights without due process of law, in violation of the Fourteenth Amendment.

24. Dealer protests against the establishment, relocation, modification or termination of motor vehicle franchises are not required, by statute or by administrative practice, to contain any factual or evidentiary showing in support of the protest. Nor are the protests required to be made under oath or to be supported by any undertaking or bond to assure that the enjoined parties could be made whole upon a determination that the protest is without merit. See Exhibits B, C, I and J.

25. When a protest is filed, the Board is required by statute automatically and without hearing to issue an order enjoining the manufacturer and its existing or potential franchisee from proceeding with the proposed action pending a hearing on and final determination of the protest. See Exhibits D, E, H, K and L. In practice, such injunctive orders are made as a matter of course by the Executive Secretary of the Board and because of the Board's position that it has complete discretion with regard to the time within which it must set matters for hearing, either before the Board or a hearing officer designated by the

Board, the injunctive orders are of indefinite duration.

26. No procedure exists under the Automobile Franchise Act or the Board's regulations for dismissal or other summary remedy prior to a full hearing on the merits, and the Board has refused to entertain any requests for summary disposition.

27. Neither the Act as interpreted by the Board nor the Board's regulations place any limits on the time within which a hearing must be scheduled or held. In practice, many months elapse between the filing of a protest and the hearing on that protest. The protests in the Pasadena Cases were filed more than ten months ago, but no hearing has been held, and none is now scheduled. Moreover, the Board customarily refers protests for initial hearing to hearing officers designated by the Board. The hearing officer has no power to make a final decision in the matter, but merely submits a proposed decision to the Board. The Act imposes no limitation on the time within which the hearing officer must submit his proposed decision to the Board. Upon receipt of the proposed decision, the Board may adopt, reject or modify it and take further evidence. The Board's injunctive order against proposed action by a manufacturer and its existing or potential franchises remains in full force and effect unless and until the ultimate Board determination on the merits becomes final, even if the proposed decision submitted by the hearing officer is against the protesting dealer.

PREEMPTION BY FEDERAL ANTITRUST LAWS

28. The Automobile Franchise Act is invalid and unconstitutional under the Supremacy Clause of the United States Constitution (Article VI, Clause 2) because it invades a field of regulation that has been preempted by federal law and conflicts with the national economic policy expressed by the federal antitrust laws.

29. The United States has enacted a comprehensive scheme of legislation designed to promote competition in the Sherman Antitrust Act (15 U.S.C. §§ 1-7), the Clayton Antitrust Act (15 U.S.C. §§12-27), and other statutes. The policy upon which these statutes are based is one of preserving free and unfettered competition as the rule of trade.

30. The Automobile Franchise Act purports to ratify combinations or conspiracies by existing motor vehicle franchisees to prevent competition and encourages the formation of such combinations and conspiracies. The inclusion of new car dealers as members of the Board created to "adjudicate" disputes over the establishment of new motor vehicle franchises further lends to the anticompetitive effect of the statute by providing a state-approved vehicle through which existing dealers and their agents can conspire openly to restrain competition by erecting artificial barriers to new entry, creating territorial restrictions, and monopolizing various geographic markets.

31. The Automobile Franchise Act severely restrains competition in the motor vehicle business in California in the following particulars:

(a) The Act establishes substantial barriers to the entry of new competitors at the retail level of the motor vehicle business and consequently restricts competition generally in the automobile business. The protracted delay and uncertainty incident to application of the Act impose onerous burdens upon prospective new car franchised dealers which include difficulty in securing financing, suitable real estate and personnel and, as well, in preserving those arrangements during the period of months or years necessary to resolve a dealer protest. Protracted delay may result in abandonment of plans to establish a dealership. Direct costs imposed upon potential franchises by the Act include legal fees, lost profits during the period of delay, and inflationary increases in the cost of financing and constructing dealership facilities.

(b) Identical burdens are imposed by the Act on existing franchisees who wish to relocate their dealerships. In addition, such franchisees must endure the enforced continuation of operations in inadequate or uneconomic facilities, or in some cases be required to cease business completely because their existing facility is no longer available as a result of condemnation, physical destruction or other circumstance beyond their control.

(c) The burdens imposed by the Act upon new and existing franchisees at the retail level likewise restrict the ability of a manufacturer to obtain adequate representation for the sale and service of its products in various geographic areas and thereby unreasonably restrains and impairs competition among manufacturers in the motor vehicle business. In addition, the Act deprives manufacturers of sales of motor vehicles and motor vehicle parts and accessories that might otherwise have resulted from business operations enjoined by the Board.

(d) The unreasonable restraints imposed upon competition in the motor vehicle business as a result of the Act tend to reduce the availability of adequate and convenient motor vehicle sales and service facilities for the public, and tend to increase the price that the public is required to pay for motor vehicles, motor vehicle parts and accessories, and motor vehicle service.

FAILURE TO PERMIT PARTICIPATION BY POTENTIAL FRANCHISEES

32. The Automobile Franchise Act is invalid and unconstitutional under the Due Process Clause of the Fourteenth Amendment because it excludes existing and potential motor vehicle franchisees from participating in protest proceedings involving the establishment or relocation of their franchises, which said proceedings materially affect such franchisees' constitutional rights to engage in a lawful business.

33. The Automobile Franchise Act contemplates only two types of parties in protests pursuant to Vehicle Code § 3062 against the establishment or relocation of a motor vehicle franchise—protesting dealers and manufacturers. The Act does not permit a proposed new franchisee or a franchisee who wishes to relocate his dealership to present evidence or argument, or otherwise to participate as a party to the hearing on a protest against establishment or relocation. In practice, both the New Motor Vehicle Board and hearing officers designated by the Board have refused to permit proposed franchisees to intervene or participate in protest proceedings.

34. Potential franchisees and franchisees seeking to relocate their dealerships are vitally interested in the outcome of protests against such action and their property rights are affected by such action. Exclusion of such parties from protest proceedings constitutes a violation of due process of law.

ABSENCE OF COMPELLING STATE INTEREST TO JUSTIFY REGULATORY SCHEME

35. The Automobile Franchise Act denies both due process and equal protection of the law in violation of the Fourteenth Amendment since there is no compelling state interest sufficient to justify the Act's impact on constitutionally protected rights.

36. The provisions of the Automobile Franchise Act go far beyond what would be reasonably necessary

to accomplish any legitimate legislative purpose. All establishments, relocations, modifications, or terminations of motor vehicle franchises are indiscriminately swept within the Act's coverage, and consequently, the Act imposes unusual and unnecessary restrictions on the right of manufacturers and franchisees to engage in a lawful business.

IMPAIRMENT OF CONTRACTS

37. The Automobile Franchise Act purports to apply to motor vehicle franchises in existence on the date of its enactment and is therefore void as a law impairing the obligation of contracts, in violation of Article I, Section 10 of the United States Constitution.

38. Section 3069 of the Vehicle Code provides that:

> "The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises."

39. The New Motor Vehicle Board has evidenced its intent to apply the Act's provisions to pre-existing franchises in the *Service Oldsmobile-GMC, Inc.* case described in Paragraph 16 of this Complaint. In that case, Service Oldsmobile is protesting the termination of franchise agreements that were signed on August 27, 1973, before the Automobile Franchise Act was

enacted or became effective. The Board has accepted Service Oldsmobile's protest for filing and has enjoined General Motors from terminating Service Oldsmobile's franchises for Oldsmobile and GMC products pending a hearing on the merits of the protest.

UNDUE BURDEN ON INTERSTATE COMMERCE

40. The Automobile Franchise Act imposes an undue burden on interstate commerce and is therefore invalid under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).

41. The Automobile Franchise Act creates substantial barriers to entry and other restraints upon competition in the motor vehicle business in California, which have been outlined in Paragraphs 30 and 31 of this Complaint. The necessary effect of those barriers and other restraints is to reduce competition for the sale of motor vehicles and motor vehicle parts and accessories, which tends to increase the price of motor vehicles and motor vehicle parts and accessories to the consuming public. To the extent competition is reduced, the quantity of motor vehicles and motor vehicle parts and accessories sold in California will consequently decline, and since a substantial proportion of such products are manufactured outside the State of California and shipped into the state in interstate commerce, the flow of interstate commerce will be impeded.

42. To the extent the Act results in a consequent reduction in the number, size and adequacy of facilities available to the public to provide repair service and parts for automobiles and trucks, competition is reduced. Since many of these automobiles and trucks are used for the shipment of goods to and from the state of California in interstate and foreign commerce, the flow of commerce will be adversely affected for this additional reason.

43. The State of California has no legitimate interest of sufficient importance to justify the burden on interstate commerce created by the Automobile Franchise Act.

DECLARATORY RELIEF

44. An actual controversy exists with respect to the constitutional validity of the Automobile Franchise Act. Plaintiffs General Motors, Fox and Muller contend that the Act is unconstitutional and invalid for all of the reasons set forth in this Complaint. Plaintiffs are informed and believe, and on that ground allege, that defendants, and each of them, contend in all respects to the contrary.

IRREPARABLE INJURY

45. Continued enforcement of the Automobile Franchise Act by defendants will cause plaintiffs and the public great and immediate irreparable injury:

(a) Under the Act, plaintiffs are automatically enjoined from establishing or relocating

motor vehicle franchises pending the hearing and determination by the Board of protests against such actions. In the Pasadena Cases, the La Canada Cases and similar situations, plaintiffs will be deprived of the full enjoyment of constitutionally protected rights of property and will lose sales of motor vehicles and motor vehicle parts and accessories that might otherwise have resulted from business operations enjoined by the Board.

(b) General Motors is now enjoined from terminating the franchises of Service Oldsmobile. General Motors' business reputation will be adversely affected by its inability to terminate promptly the franchises of a dealer who has failed to perform its obligations under the franchise agreements and which has gone out of business.

(c) Plaintiffs will suffer not only economic harm, but also that harm engendered by the imminent deprivation of constitutional rights, including the rights of due process before a fair and impartial tribunal.

(d) Plaintiffs will suffer other injuries, such as the loss of public goodwill. It would be difficult or impossible to ascertain the amount of pecuniary compensation that would afford adequate compensation for such injuries.

(e) The public will also suffer great and irreparable injury unless the Automobile Fran-

chise Act is declared unconstitutional, in that competition in the motor vehicle business will be unreasonably restrained, thereby reducing the opportunities available to the public for motor vehicle sales and service and increasing the cost of motor vehicles and motor vehicle parts and accessories.

46. Plaintiffs have no adequate remedy at law, because the harm is that engendered by the imminent deprivation of constitutional rights, and because there is no legal theory upon which they can recover damages for the injuries described above from the defendants. For the same reason, an appeal from the ultimate determination of these protests by the Board is not an adequate remedy.

Wherefore, plaintiffs pray:

1. That the Automobile Franchise Act be declared unconstitutional, void and unenforceable;

2. That defendants, their agents, and any person acting on their behalf, at their direction or under their control be permanently enjoined from taking any action to implement or enforce the provisions of the Automobile Franchise Act;

3. That upon further application by plaintiffs pending final determination of this action, defendants, their agents, and any person acting on their behalf, at their direction or under their control be preliminary enjoined from taking any action to implement or enforce the provisions of the Automobile Franchise Act; and

4. That plaintiffs recover their costs of suit herein together with such other and further relief as the Court may deem just and proper.

Dated: April 13, 1976.

Hahn & Hahn
George R. Baffa
By /s/ George R. Baffa
George R. Baffa
Attorneys for Plaintiff
Orrin W. Fox Co.

Norin T. Grancell
A Professional Corporation
By /s/ Norin T. Grancell
Norin T. Grancell
Attorney for Muller Chevrolet

O'Melveny & Myers
Girard E. Boudreau, Jr.
John G. Niles
Sheldon H. Lytton
By /s/ Girard E. Boudreau, Jr.
Girard E. Boudreau, Jr.
Attorneys for Plaintiff
General Motors Corporation

Of Counsel for Plaintiff
General Motors Corporation:
Frazer F. Hilder, General Counsel
By Robert W. Culver

Exhibit A

VEHICLE CODE

§ 3057. Effective date of orders of board: final orders

Index to Notes

In general 1
Discretion 2

1. In general

Where car dealer did not file his request for a hearing until more than 30 days after order of new car dealers policy and appeals board suspending dealer's license had become final, the dealer was not entitled to further review by the board. Park Motors, Inc. v. Director, Dept. of Motor Vehicles (1973) 122 Cal.Rptr. 337, 49 C.A.3d 12.

2. Discretion

Where trial court, by writ of mandate had circumscribed the matters which the new car dealers policy and appeals board could consider in review of revocation of dealer's license and any appearance by the dealer before the board would be of no consequence, the dealer was not denied due process because it was not given notice of the board's meeting and was not present at the meeting. Park Motors, Inc. v. Director, Dept. of Motor Vehicles (1973) 122 Cal.Rptr. 337, 49 C.A.3d 12.

ARTICLE 4. HEARINGS ON FRANCHISE MODIFICATION, REPLACEMENT, TERMINATION, REFUSAL TO CONTINUE * * *, DELIVERY AND PREPARATION OBLIGATIONS, AND WARRANTY REIMBURSEMENT

Heading of Article 4, Hearings on Franchise Modification, Replacement, Termination, Refusal to Continue and Issuance, was amended by Stats.1974, c. 384, p. 953, § 3, urgency, eff. July 5, 1974, operative July 1, 1974, to read as it now appears.

Sec.
3060. Termination of franchise.
3061. Good cause.

Asterisks * * * indicate deletions by amendment.

3062. Establishing or relocating dealerships.
3063. Good cause.
3064. Delivery and preparation obligation.
3065. Warranty reimbursement.
3066. Hearings on protests.
3067. Decision.
3068. Judicial review.
3069. Application of article.

Article 4 was added by Stats.1973, c. 996, p. 1967, § 16, operative July 1, 1974.

Protests, see 13 Cal.Adm.Code 583 et seq.

Legislative finding and declaration in enactment of Stats. 1973, c. 998, see note under § 3000.

No local cost reimbursement in implementing Stats.1973, c. 996, see note under §3060.

§ 3060. Termination of franchise

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3068, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment unless the franchisor shall have first given the board and each affected * * * franchisee notice thereof at

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least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a * * * franchisee may file * * * a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the * * * protest by the board. In the event of multiple * * * protests, hearings shall be consolidated to expedite the disposition of the issue. (Added by Stats. 1973, c. 996, p. 1967, § 16, operative Juy 1, 1974. Amended by Stats. 1974, c. 384, p. 953, § 4, urgency, eff. July 5, 1974, operative July 1, 1974.)

1974 Amendment. Substituted in the second paragraph of subd. (c), "franchisee" for "dealer" and "protest" for "appeal".

Library references
Contracts ⇐217.
C.J.S. Contracts §§ 397, 449.

§ 3061. Good cause

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

Asterisks * * * indicate deletions by amendment.
Underline indicates changes or additions by amendment.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee' failure to comply with the terms of the franchise.
(Added by Stats.1973, c. 996, p. 1963, § 16, operative July 1, 1974.)

§ 3062. Establishing or relocating dealerships

In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership * * * within or into a relevant market area where the same line-make is then represented, the

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Underline indicates changes or additions by amendment.

franchisor shall in writing first notify the board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate * * * an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee * * * may file with the board a protest to the establishing or relocating of the * * * dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such * * * dealership. In the event of multiple protests, hearings * * * may be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

(Added by Stats.1973, c. 996, p. 1969, § 16, operative July 1, 1974. Amended by Stats. 1974, c. 384, p. 954, § 5, urgency, eff. July 5, 1974, operative July 1, 1974; Stats.1975, c. 653, p. ....., § 1.)

Asterisks * * * indicate deletions by amendment.
Underline indicates changes or additions by amendment.

1974 Amendment. Substituted, in the first sentence, following "franchisor" the words "shall in writing first notify the board and" for "shall notify in writing"; substituted "franchisee" for "dealer" in the second sentence; rewrote the third sentence which previously read: "if a notice of protest is filed, the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided for in Section 3066, nor thereafter if the board has determined that there is good cause for not permitting such additional dealership"; and added the last sentence relating to multiple protests.

1975 Amendment. Required board to inform franchisor that he may not establish or relocate dealership until board held specified hearing on protest, permitted rather than required board to consolidate protests in single hearing, and added second paragraph.

§ 3063. Good cause

In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Permanency of the investment.

(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(3) Whether it is injurious to the public welfare for an additional franchise to be established.

(4) Whether the franchises of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.
(Added by Stats.1973, c. 996, p. 1960, § 16, operative July 1, 1974.)

§ 3064. Delivery and preparation obligation

(a) Every franchisor shall specify to its franchisees the delivery and preparation obligations of such franchisees prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations, which shall constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but which shall not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with such delivery and preparation obligations shall be filed with the board by franchisors, and shall constitute the compensation as set forth on such schedule. The schedule of compensation shall be reasonable, with the reasonableness thereof being subject to the approval of the board, providing a franchisee files a notice of protest with the board. In determining the reasonableness of the schedules, the board shall consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate.

(b) Upon delivery of the vehicle, the franchisee shall give a copy of the delivery and preparation obligations to the purchaser and a written certification that he has fulfilled these obligations.
(Added by Stats. 1973, c. 996, p. 1960, § 16, operative July 1, 1974.)

Library references
Automobiles ⇐16.
C.J.S. Motor Vehicles § 165 et seq.

§ 3065. Warranty reimbursement

(a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill such warranty when the franchisee has fulfilled warranty obligations of repair and servicing and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation. The reasonableness thereof shall be subject to the determination of the board; provided that a franchisee files a notice of protest with the board.

(b) In determining the adequacy and fairness of such compensation, the franchisee's effective labor rate charged to its various retail customers may be considered together with other relevant criteria.

(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that such part,

in fact, is not defective, the franchisor shall return such part so alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d) All such claims made by franchisees hereinunder shall be either approved or disapproved within 30 days after their receipt by the franchisor. When any such claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within such period, and each notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this section and Section 3064 for such labor and parts shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

(Added by Stats.1973, c. 996, p. 1970, § 16, operative July 1, 1974.)

Library references
Contracts ⇐205.
C.J.S. Contracts §§ 327, 342

§ 3066. Hearings on protest

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups

which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, * * * 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor * * * vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(Added by Stats.1973, c. 996, p. 1970, § 16, operative July 1, 1974. Amended by Stats.1974, c. 384, p.955, § 6, urgency, eff. July 5, 1974, operative July 1, 1974.)

1974 Amendment. Authorized "hearing officer designated by the board" to hear and consider evidence and included sections "11510" and "11517" in the enumeration in subd. (a).

Asterisks * * * indicate deletions by amendment.
Underline indicates changes or additions by amendment.

§ 3067. Decision

The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or * * * within such * * * period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

(Added by Stats.1973, c. 966, p. 1971, § 16, operative July 1, 1974. Amended by Stats.1974, c. 384, p. 955, § 7, urgency eff. July 5, 1974, operative July 1, 1974.)

1974 Amendment, Substituted, in the second sentence, "within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or" for "or such longer period".

§ 3068. Judicial review

Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date on

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which the final order of the board is made public and is delivered to the parties personally or is sent them by registered mail * * *.

(Added by Stats. 1973, c. 966, p. 1971, § 16, operative July 1, 1974. Amended by Stats.1974, c. 384, p. 955, § 8, urgency, eff. July 5, 1974, operative July 1, 1974.)

1974 Amendment. Deleted following "registered mail" provision relating to individuals and groups having requested notification by the board of protests and decisions of the board.

§ 3069. Application of article

The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises.

(Added by Stats.1973, c. 996, p. 1971, § 16, operative July 1, 1974.)

*Asterisks * * * indicate deletions by amendment.

Exhibit B

Boller, Suttner & Gekas
Thomas R. Suttner
Fifty North First Avenue
Arcadia, California 91006
(213) 447-8107
Attorneys for
Becherer Buick, Inc.

New Motor Vehicle Board

State of California—Transportation Agency

PR-35-75

Becherer Buick, Inc.

vs.

Buick Motor Division,
General Motors Corporation

NOTICE OF PROTEST AND REQUEST FOR HEARING

To: Buick Motor Division, General Motors Corporation:

1. Protestant Becherer Buick, Inc. is the holder of a new car dealer's license and is a franchisee of Buick Motor Division.

2. Heretofore protestant has filed with the above named Board its protests of May 12, 1975 and March

26, 1975 respecting the establishment of a new franchise or additional dealership in the relevant market area as defined by statute.

3. Copies of said protests are annexed hereto and served herewith.

4. Protestant formally requests a hearing before the Board, as required by Vehicle Code Sections 3062 to 3069, inclusive.

Dated: May 22, 1975.

Boller, Suttner & Gekas
By /s/ Thomas R. Suttner
Thomas R. Suttner
Attorneys for Becherer Buick, Inc.

May 12, 1975

New Motor Vehicle Board
2415 First Avenue
Post Office Box 31
Sacramento, Calif. 95801

Attention: Sam Jennings
Executive Secretary

Dear Sirs:

We are attorneys for Becherer Buick, Inc., 840 West Huntington Drive, Monrovia, California and O'Donnell Buick-Opel, Inc., 220 South San Gabriel, San Gabriel, California. Both are present holders of franchises to sell Buick automobiles.

On May 9, 1975, there was announced in the Pasadena Star News, a daily newspaper of general circulation published in this area, that a new dealer franchise had been established by General Motors Corporation, Buick Motor Division, at the Orrin W. Fox Co., 3456 East Colorado Blvd., Pasadena Post Office, Los Angeles County, California. There has been no notice in writing to Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc., or to either of them, of the intention of General Motors Corporation to establish an additional Buick dealership in the relevant market area where the same line-make, to wit: Buick, is represented. Our two clients are located in the relevant and applicable market area, defined by Vehicle Code Section 507. Becherer Buick, Inc. is 4.1 miles from the Orrin W. Fox Co. location and O'Donnell Buick-Opel, Inc. is 4.6 miles from the Orrin W. Fox Co. location.

The attempted establishment by General Motors of an additional Buick dealer Franchise with the Orrin W. Fox Co. at said location without prior notice in writing to our clients violates Vehicle Code Section 3062. Pursuant to said section, we hereby protest to the establishing of the proposed additional dealership and respectfully request that the Board order the Orrin W. Fox Co. and General Motors Corporation to cease and desist from the operation and maintenance of said additional dealership at said location pending hearing and determination of this protest under Vehicle Code Sections 3066, 3067 and 3068.

This protest is filed to protect the record and is in no way an admission that General Motors Corporation properly failed to give written notice as required by the statute but we must assume from the action of General Motors Corporation, as evidenced by the newspaper advertising, and by the presence of new Buick automobiles at the establishment of the Orrin W. Fox Co., that General Motors Corporation does not intend to comply with the requirements of the statute and has wilfully and intentionally disregarded same. Therefore this is a demand on behalf of our clients for a hearing as provided by statute, and for the issuance of a cease and desist order pending same.

Yours very truly,

Boller, Suttner & Gekas

By
As attorneys for Becherer Buick Inc. and O'Donnell Buick-Opel, Inc.

TRS:ef

cc: Becherer Buick
O'Donnell Buick-Opel, Inc.

March 26, 1975

New Motor Vehicle Board,
2415 First Avenue,
P. O. Box 31,
Sacramento, California 95801.

Attention: Executive Secretary

Dear Sirs:

We write this letter of (sic) behalf of Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc.

Becherer is located at 840 W. Huntington Drive, Monrovia, California, and O'Donnell at 220 S. San Gabriel Blvd., San Gabriel, California.

These locations are 4.1 and 4.6 miles from the point in Los Angeles County, not incorporated but sometimes termed "East Pasadena", at which Buick Motor Division of General Motors is believed to be about to locate a new Buick franchise. The specific location is believed to be at or near 3456 East Colorado Blvd.

Efforts of O'Donnell and Becherer to confirm this intention by inquiry of local General Motors representatives have been without avail. They have been informed that new dealerships will not be discussed with present dealers and that this interdict emanates from the company headquarters in Flint, Michigan.

This in turn suggests that Buick Division may not intend to comply with, or may have overlooked, Vehicle Code Sections 3060 to 3063 and Section 507 relating to notice and hearing on proposed new dealerships.

As shown by the locations given above both O'Donnell and Becherer are within the "relevant market

area" or ten mile radius from the site of the potential new dealership at 3456 E. Colorado Blvd., East Pasadena, as prescribed by Vehicle Code Sec. 507, and therefore are entitled to protest any additional motor vehicle dealership at the suspected location, for the sale of Buicks.

We therefore make formal request under Vehicle Code Section 3062 for the hearing provided for in Vehicle Code Section 3066.

Under the circumstances, this request may be deemed premature and the Board may wish to await issuance by Buick of a written notice of its intention. However, the facts also are unclear and the Code unfortunately does not require Buick to give notice to the Board which requires us to make this protest now, to protect the record.

We would suggest that as an interim act you notify the Department that no new car dealer license may issue for Buick within our area until you have advised the Department that a hearing has been held, whether or not Buick gives proper notice.

Yours very truly,

Boller, Suttner & Gekas

By:

TRS:vlm

CC Mr. Robert A. Smith
466-3211
1750 N. Cahuenga Blvd.
LA CA 90028

Exhibit C

Boller, Suttner & Gekas
Thomas R. Suttner
Attorneys for
O'Donnell Buick-Opel Inc.
Fifty North First Avenue
Arcadia, California 91006
(213) 447-8107

New Motor Vehicle Board
State of California—Transportation Agency

PR-36-75

O'Donnell Buick-Opel Inc.

vs.

Buick Motor Division, General Motors Corporation

NOTICE OF PROTEST AND REQUEST FOR HEARING

To: Buick Motor Division, General Motors Corporation:

1. Protestant O'Donnell Buick-Opel Inc. is the holder of a new car dealer's license and is a franchisee of Buick Motor Division.

2. Heretofore protestant has filed with the above named Board its protests of May 12, 1975 and March

26, 1975 respecting the establishment of a new franchise or additional dealership in the relevant market area as defined by statute.

3. Copies of said protests are annexed hereto and served herewith.

4. Protestant formally requests a hearing before the Board, as required by Vehicle Code Sections 3062 to 3069, inclusive.

Dated: May 22, 1975.

Boller, Suttner & Gekas

By /s/ Thomas R. Suttner
Thomas R. Suttner
Attorneys for O'Donnell Buick-Opel Inc.

May 12, 1975

New Motor Vehicle Board
2415 First Avenue
Post Office Box 31
Sacramento, Calif. 95801

Attention: Sam Jennings
Executive Secretary

Dear Sirs:

We are attorneys for Becherer Buick, Inc., 840 West Huntington Drive, Monrovia, California and O'Donnell Buick-Opel, Inc., 220 South San Gabriel, San Gabriel, California. Both are present holders of franchises to sell Buick automobiles.

On May 9, 1975, there was announced in the Pasadena Star News, a daily newspaper of general circulation published in this area, that a new dealer franchise had been established by General Motors Corporation, Buick Motor Division, at the Orrin W. Fox Co., 3456 East Colorado Blvd., Pasadena Post Office, Los Angeles County, California. There has been no notice in writing to Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc., or to either of them, of the intention of General Motors Corporation to establish an additional Buick dealership in the relevent market area where the same line-make, to wit: Buick, is represented. Our two clients are located in the relevent and applicable market area, defined by Vehicle Code Section 507. Becherer Buick, Inc. is 4.1 miles from the Orrin W. Fox Co. location and O'Donnell Buick-Opel, Inc. is 4.6 miles from the Orrin W. Fox Co. location.

The attempted establishment by General Motors of an additional Buick dealer Franchise with the Orrin W. Fox Co. at said location without prior notice in writing to our clients violates Vehicle Code Section 3062. Pursuant to said section, we hereby protest to the establishing of the proposed additional dealership and respectfully request that the Board order the Orrin W. Fox Co. and General Motors Corporation to cease and desist from the operation and maintenance of said additional dealership at said location pending hearing and determination of this protest under Vehicle Code Sections 3066, 3067 and 3068.

This protest is filed to protect the record and is in no way an admission that General Motors Corporation properly failed to give written notice as required by the statute but we must assume from the action of General Motors Corporation, as evidenced by the newspaper advertising, and by the presence of new Buick automobiles at the establishment of the Orrin W. Fox Co., that General Motors Corporation does not intend to comply with the requirements of the statute and has wilfully and intentionally disregarded same. Therefore this is a demand on behalf of our clients for a hearing as provided by statute, and for the issuance of a cease and desist order pending same.

Yours very truly,

Boller, Suttner & Gekas

By

As attorneys for Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc.

TRS:ef

cc: Becherer Buick
O'Donnell Buick-Opel, Inc.

March 26, 1975

New Motor Vehicle Board,
2415 First Avenue,
P. O. Box 31,
Sacramento, California 95801.

Attention: Executive Secretary

Dear Sirs:

We write this letter of behalf of Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc.

Becherer is located at 840 W. Huntington Drive, Monrovia, California, and O'Donnell at 220 S. San Gabriel Blvd., San Gabriel, California.

These locations are 4.1 and 4.6 miles from the point in Los Angeles County, not incorporated but sometimes termed "East Pasadena", at which Buick Motor Division of General Motors is believed to be about to locate a new Buick franchise. The specific location is believed to be at or near 3456 East Colorado Blvd.

Efforts of O'Donnell and Becherer to confirm this intention by inquiry of local General Motors representatives have been without avail. They have been informed that new dealerships will not be discussed with present dealers and that this interdict emanates from the company headquarters in Flint, Michigan.

This in turn suggests that Buick Division may not intend to comply with, or may have overlooked, Vehicle Code Sections 3060 to 3063 and Section 507 relating to notice and hearing on proposed new dealerships.

As shown by the locations given above both O'Donnell and Becherer are within the "relevant market area" or ten mile radius from the site of the potential new dealership at 3456 E. Colorado Blvd., East Pasadena, as prescribed by Vehicle Code Sec. 507, and therefore are entitled to protest any additional motor vehicle dealership at the suspected location, for the sale of Buicks.

We therefore make formal request under Vehicle Code Section 3062 for the hearing provided for in Vehicle Code Section 3066.

Under the circumstances, this request may be deemed premature and the Board may wish to await issuance by Buick of a written notice of its intention. However, the facts also are unclear and the Code unfortunately does not require Buick to give notice to the Board which requires us to make this protest now, to protect the record.

We would suggest that as an interim act you notify the Department that no new car dealer license may issue for Buick within our area until you have advised the Department that a hearing has been held, whether or not Buick gives proper notice.

Yours very truly,

Boller, Suttner & Gekas

By:

TRS:vlm

CC Mr. Robert A. Smith
466-3211
1750 N. Cahuenga Blvd
L A CA 90028

Exhibit D

State of California—Transportation Agency
New Motor Vehicle Board
2415 First Avenue, P. O. Box 31
Sacramento, California 95801
(916) 445-1888

Certified Mail

May 29, 1975

Buick Motor Division
General Motors Corporation
748 Townsgate Road, Suite 300
One Thousand Oaks, CA 91361

Re: Becherer Buick, Inc. vs. Buick Motor Division
Protest No. PR-35-75

Gentlemen:

You are hereby notified that Becherer Buick, Inc., 840 West Huntington Drive, Monrovia, California, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. Accordingly, you are advised you may not establish or relocate the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership. It is the Board's understanding that the proposed new dealership would be located at:

3456 East Colorado Blvd., Pasadena, California

In accordance with Section 3066 of the code, the

Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,
New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

cc: Thomas R. Suttner, Esq.
Elwyn L. Judd

Exhibit E

State of California—Transportation Agency

New Motor Vehicle Board
2415 First Avenue, P. O. Box 31
Sacramento, California 95801
(916) 445-1888

Certified Mail

May 29, 1975

Buick Motor Division
General Motors Corporation
748 Townsgate Road, Suite 300
One Thousand Oaks, CA 91361

Re: O'Donnell Buick-Opel, Inc. vs. Buick Motor Division
Protest No. PR-36-75

Gentlemen:

You are hereby notified that O'Donnell Buick-Opel, Inc., 220 South San Gabriel, San Gabriel, California, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. Accordingly, you are advised you may not establish or relocate the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership. It is the Board's understanding that the proposed new dealership would be located at:

3456 East Colorado Blvd., Pasadena, California

In accordance with Section 3066 of the code, the Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,
New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

cc: Thomas R. Suttner, Esq.
Elwyn L. Judd

Exhibit F

State of California—Business and Transportation Agency
Office of the Director
Department of Motor Vehicles
P. O. Box 1828
Sacramento, CA 95809
(916) 322-6378

July 11, 1975

Hahn & Hahn
Attorneys at Law
Suite 900
301 East Colorado Boulevard
Pasadena, CA 91101

Attention: George R. Baffa

Gentlemen:

Your letter of July 3, 1975, addressed to the Pasadena office of the Department of Motor Vehicles has been referred to me for reply.

After receiving your letter I also reviewed the relevant code sections and other correspondence in both the department's file and in the file of the New Motor Vehicle Board. My opinion is that the franchise of Buick Motor Division to Orrin W. Fox Company to sell Buick and Opel automobiles at 3456 East Colorado Boulevard, Pasadena, California, constitutes the establishment of an additional motor vehicle dealership within the meaning of Vehicle Code Section 3062. Even if that opinion is questioned because Orrin Fox is a replacement dealer for Walter Klock Buick,

the franchise of Orrin Fox would be a relocation of an existing motor vehicle dealership within the meaning of Vehicle Code Section 3062. In either event the decision of Buick Motor Division to give no notice to existing dealers in connection with the franchising of Orrin W. Fox Company constitutes a violation of Vehicle Code Section 3062 and is actionable against the manufacturer's license of Buick Motor Division pursuant to the provisions of Vehicle Code Section 11713.2(1).

The result is that the franchise issued to Orrin W. Fox Company is proscribed by law and is therefore inoperable insofar as the Department of Motor Vehicles is concerned. This is especially so since two other Buick franchisees, Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc., have filed protests with the New Motor Vehicle Board pursuant to the provisions of Vehicle Code Section 3062. The Board has, in turn, notified the Buick Motor Division that the protests have been filed and that the Buick Motor Division may not establish or relocate the dealership proposed for Orrin Fox.

The immediate effect on your client is two-fold:

(1) If your client certifies on an application for registration of a new vehicle that Orrin W. Fox Company has a valid franchise on file with the department to sell new Buicks and Opels, such certification will constitute a violation of Vehicle Code Section 20 and will be a ground for suspension or revocation of Fox's dealer's license pursuant to the provision of Vehicle Code Section 11705(a) (3).

(2) If your client advertises either in the media or by word of mouth in direct communication with prospective purchasers that Orrin W. Fox Company is a Buick or Opel dealer, such advertisements will be in violation of Vehicle Code Section 11713(a) and a ground for suspension or revocation of Fox's dealer's license pursuant to the provisions of Vehicle Code Section 11705(a) (10).

Please contact me directly if I can be of further assistance to you in this matter.

Very truly yours,

/s/ Alan Mateer
Alan Mateer
Staff Counsel

cc: Mr. Sam W. Jennings
Mr. J. F. Lyman, Manager
Buick Motor Division
General Motors Corporation
Flint, Michigan 48550

Exhibit G

H. Gary Jeffries
Attorney at Law
Suite 810, First Western Bank Building
595 East Colorado
Pasadena, California 91101
Telephone 793-1539

Attorney for Petitioners

New Motor Vehicle Board

No.

Service Oldsmobile-GMC, Inc.;
George E. Fuller, George Cashman,
Petitioners,
vs.
General Motors Corporation
(Oldsmobile Division, Truck and
Coach Division),
Respondents.

PROTEST UNDER §3060 and §3062,
CALIFORNIA VEHICLE CODE

Petitioners, Service Oldsmobile-GMC, Inc., George E. Fuller, and George Cashman, allege as follows:

1.

Respondent, General Motors Corporation, is now, and at all times mentioned herein, is a manufacturer of motor vehicles and has within its operations, an Oldsmobile Division and a Truck and Coach Divi-

sion and is a franchisor within the meaning of §331.2 of the Vehicle Code of the State of California.

2.

Petitioner, Service Oldsmobile-GMC, Inc., is now, and at all times mentioned herein was a corporation duly organized and existing under and by virtue of the laws of the state of California and is authorized to do and is engaged in doing business in the State of California. Said Petitioner Service Oldsmobile-GMC, Inc., is further a franchisee within the meaning of §331.1 of the Vehicle Code of the State of California.

3.

That at all times herein mentioned, petitioners George E. Fuller and George Cashman, have been officers and directors of the petitioner Service Oldsmobile-GMC, Inc. That at all times herein mentioned, said individual petitioners together with Service Oldsmobile-GMC, Inc., have conducted a new motor vehicle business as a franchisee at 3555 East South Street, Long Beach, California. That at all times herein mentioned, the petitioners have conducted the aforesaid business in accordance with, and pursuant to franchise agreements with the Oldsmobile Automobile Division and with the Truck and Coach Division of the respondent General Motors Corporation.

4.

That on or about April 18, 1975, the Oldsmobile Division of General Motors Corporation, served a

sixty day notice upon your petitioners that said respondent had elected and did thereby terminate the franchise agreement by and between the parties herein. A copy of said sixty day notice is attached hereto as Exhibit "A" and incorporated herein by reference.

5.

That on or about May 10, 1975, the Truck and Coach Division of General Motors Corporation, served a sixty day notice upon your petitioners that said respondent had elected and did thereby terminate the franchise agreement by and between the parties herein. A copy of said notice is attached hereto as Exhibit "B" and is incorporated herein by reference.

6.

That for some time prior to acquiring the aforesaid franchise agreement from respondent General Motors Corporation, your petitioners had investigated the feasibility of conducting a new motor vehicle dealership at the aforesaid South Street address. Your petitioners had determined that several prior predecessors had not been successful in operating a Oldsmobile new car dealership and that in fact three predecessors had been unsuccessful at the same address. In the course of investigating the feasibility of operating a new motor vehicle dealership at the aforesaid address, your petitioners were assured by representatives of General Motors Corporation and General Motors Acceptance Corporation, that if they would concurrently operate a General Motors Motor Home dealership with a Oldsmobile and G M C truck

franchise, then your petitioners would be successful in conducting business at the aforesaid site notwithstanding the prior business failures at said site. In reliance upon the representation by General Motors Corporation, and upon further investigation, your petitioners believed that they could successfully operate a new motor vehicle dealership at the aforesaid address provided that said dealership would include the sale and servicing of G M C trucks and G M C motor homes. Thereafter, your petitioners entered into and acquired the aforesaid franchise to conduct new car sales of Oldsmobile automobiles and new vehicle sales of G M C trucks and motor homes.

7.

As a part of the aforesaid acquisition of the General Motors franchise your petitioners agreed to develop and to construct improvements upon the aforesaid South Street address. Your petitioners were required to invest and to incur liabilities for the construction of facilities for the purpose of sales, servicing, and maintenance of G M C motor homes and G M C trucks. Said investment by your petitioners was at a sum in excess of $143,000.00. At all times herein mentioned, representatives of General Motors Corporation and General Motors Acceptance Corporation represented to your petitioners that they would not agree to grant the aforesaid franchises nor would they provide your petitioners with G M C trucks and G M C motor homes unless the aforesaid improvements, construction and developments were made on the subject site.

8.

That in order to construct and make the aforesaid improvements to the subject site, your petitioners entered into a collateral agreement with General Motors Acceptance corporation whereby said corporation loaned to your petitioners the sum of $100,000.00.

9.

That subsequent to incurring the aforesaid obligations, and causing to be constructed the improvements on the aforesaid site for purposes of conducting and operating a G M C Truck and a G M C Motor Home dealership on the aforesaid premises, the respondent General Motors Corporation refused and failed to fill your petitioner's order for G M C motor homes. That at all times herein mentioned, the respondent General Motors Corporation alleged that it could not fill orders or ship G M C motor homes to petitioner's dealership by reason of the inability of General Motors to qualify the subject motor homes for sale within the State of California. That at all times herein mentioned, said General Motors Corporation could have qualified the subject motor homes with the exercise of reasonable diligence. That at all times herein mentioned, General Motors Corporation did not obtain qualification or approval for its motor homes within the State of California notwithstanding the fact that said approval and qualification could have easily been obtained and thereby enabled your petitioners to receive shipment of said motor homes and to sell same. That the sale of General Motors motor homes was a profitable business and had re-

spondent filled orders for same, your petitioners business would have profited and been successful. That by reason of General Motors failure to provide the aforesaid motor homes, your petitioners were subject to dire and stringent financial hardship and were unable to conduct a successful dealership the aforesaid site. That it was not until about the month of April, 1975, that General Motors finally qualified its motor home for sale within the State of California. That if allowed to continue the franchise business for the sale of G M C trucks and G M C motor homes, your petitioners will be able to conduct a successful new car vehicle dealership.

10.

That in connection with, and as a part of acquiring the franchise, representatives of General Motors Corporation and General Motors Acceptance Corporation, required your petitioners to include a prior General Motors dealer as a party to the original franchise and to which prior dealer, your petitioners were required to issue approximately $100,000.00 shares of stock for the sum of $50,000.00. That said requirement of the aforesaid representatives of General Motors Corporation and General Motors Acceptance Corporation represented an unjust and improper imposition of liability upon your petitioners. Further, your petitioners in the course of business dealings with General Motors Corporation and General Motors Acceptance Corporation were frequently required to surrender assets, cash, and receivables to representatives of General Motors Corporation and General Motors Acceptance Corporation without

proper authorization or legal process. Further, that in the course of conduct of business at the aforesaid site, representatives of General Motors Corporation and General Motors Acceptance Corporation physically interferred with the conduct of business at the aforesaid site so as to cause embarrassment by and between petitioners and customers all of which, dissuaded customers from doing business with your petitioner and further causing financial hardship for the conduct of business at the aforesaid site.

11.

That all of the foregoing actions by General Motors Corporation were wrongful and improper. That but for said actions, your petitioners would have been successful in conducting the aforesaid franchise business. That respondent General Motors Corporation should not be permitted to terminate the franchise relationship by and between the parties and should be ordered to cease and desist from the aforesaid wrongful activities.

SECOND CAUSE OF ACTION

12.

Petitioners incorporate by reference paragraphs 1 through 11 of the First Cause of Action and repeat and reallege same as though set forth in full.

13.

That on or about May 5, 1975, petitioners received notice from General Motors Corporation (Truck and Coach Division) of their intention to franchise a

General Motors Corporation Truck and Coach dealership on Norwalk Boulevard just North of Telegraph Road in Santa Fe Springs, California. That said proposed additional dealership is within the relevant market area of that dealership operated and conducted by your petitioners. In accordance with §3062 of the California Vehicle Code, your petitioners hereby protest the establishment of an additional dealership within the above relevant market area. Said Notice is attached hereto as Exhibit "C".

Wherefore, your petitioners respectively request this Honorable Board to set a hearing on the protest herein filed pursuant to Sections 3060 and 3062 of the California Vehicle Code. Your petitioners will appear and present evidence at the time of the hearing.

By:

Dated: May 16, 1975 /s/ George E. Fuller
George E. Fuller,
President Service Oldsmobile-GMC, Inc.

Dated: May 16, 1975 /s/ George E. Fuller
George E. Fuller

Dated: May 16, 1975 /s/ George Cashman
George Cashman

Dated: May 16, 1975 /s/ H. Gary Jeffries
H. Gary Jeffries
Attorney for Petitioners

Exhibit "A"

Certified Mail April 17, 1975
Return Receipt Requested
Service Oldsmobile-GMC, Inc.
P. O. Box 5050
Long Beach, Ca. 90805

Attention: Messrs. George E. Fuller and George F. Cashman

Gentlemen:

It has been brought to Oldsmobile Division's attention that Service Oldsmobile-GMC, Inc., has been closed to Oldsmobile Division customers since late in February 1975. Section 5C of the Oldsmobile Dealer Sales and Service Agreement governs in part the requirements for dealership operations and provides:

> "Maintaining Dealership Operations Open for Business
>
> "Since the transportation needs of customers and owners served by Dealer can be fulfilled properly only if Dealer keeps its Dealership Premises open for business, Dealer shall maintain its respective Dealership Operations open for business during all days and hours which are customary and lawful for such operations in the community or locality in which the Dealership Operations are located."

Section 11B(8) of the Oldsmobile Dealer Sales and Service Agreement provides that Oldsmobile may terminate such agreement upon the:

> "Failure of Dealer to maintain the Dealership Operations open for business, as required under

the provisions of subsection C of Section 5 of this Agreement for seven (7) consecutive business days."

Accordingly, please take notice that Oldsmobile Division, General Motors Corporation, has elected to and does hereby terminate your Oldsmobile Dealer Sales and Service Agreement in accordance with Section 11B(8). Termination of your Agreement shall become effective 60 days after your receipt of this notice, and your status as an Oldsmobile Dealer will cease on that date.

Please be assured that Oldsmobile will endeavor to fulfill as expeditiously as practicable all of its obligations as set forth in the Oldsmobile Dealer Sales and Service Agreement as may be applicable under these circumstances.

Very truly yours,

Oldsmobile Division
General Motors Corporation
J. T.

JTD:dm Assistant Zone Manager

cc: Mr. George F. Cashman
#2 Crest Road East
Rolling Hills, Ca. 90274

Mr. George E. Fuller
4434 Woodley Avenue
Encino, Ca. 91406

California New Motor Vehicle Board
2415 First Avenue
P. O. Box 31
Sacramento, Ca. 95801

Exhibit "B"

GMC Truck & Coach
Division

General Motors Corporation
8155 Van Nuys Blvd.
Suite 1030
Panorama Towers
Panorama City, Ca. 91402
Phone 213/873-7554

April 17, 1975

Service Oldsmobile-GMC, Inc.
3555 E. South Street
P. O. Box 5050
Long Beach, California 90805

Attention: Messrs. George E. Fuller and George F. Cashman

Gentlemen:

It has been brought to GMC Truck & Coach Division's attention that Service Oldsmobile-GMC, Inc. has been closed to GMC Truck & Coach Division's customers since late in February, 1975. Section 5C of your GMC Truck & Coach Division Dealer Sales and Service Agreement, governs in part the Requirements for Dealership Operations and provides:

Maintaining Dealership Operations Open for Business

"Since the transportation needs of customers and owners served by Dealer can be fulfilled properly only if Dealer keeps its Dealership Premises open for business, Dealer shall maintain its respective Dealership Operations open for business during all days and hours which are customary and lawful for such operations in the community or locality in which the Dealership Operations are located."

Section 11B(8) of the GMC Truck & Coach Division Dealer Sales and Service Agreement provides that GMC Truck & Coach Division may terminate such agreement upon the:

"Failure of Dealer to maintain the Dealership Operations open for business, as required under the provisions of subsection C of Section 5 of this Agreement, for seven (7) consecutive business days."

Accordingly, please take notice that GMC Truck & Coach Division, General Motors Corporation, has elected to and does hereby terminate your Standard Line and Motor Home GMC Truck & Coach Division Dealer Sales and Service Agreements in accordance with Section 11B(8). Termination of your Agreements shall become effective 60 days after your receipt of this notice and your status as a GMC Truck & Coach Division Dealer will cease on that date.

Please be assured that GMC Truck & Coach Division will endeavor to fulfill as expeditiously as practicable all of its obligations as set forth in the GMC Truck &

Coach Division Dealer Sales and Service Agreement as may be applicable under these circumstances.

Very truly yours,

GMC Truck & Coach Division
General Motors Corporation

/s/ F. M. Tobias
F. M. Tobias,
Zone Manager

CC: Mr. George E. Fuller
4434 Woodley Avenue
Encino, California 91406

Mr. George F. Cashman
#2 Crest Road East
Rolling Hills, California 90274

California New Motor Vehicle Board
2415 First Avenue
P.O. Box 31
Sacramento, California 95801

Exhibit "C"

GMC Truck & Coach Division
General Motors Corporation
660 South Boulevard, East
Pontiac, Michigan 48053
313/857-5000

April 24, 1975

Mr. George E. Fuller, Pres.
Service Oldsmobile-GMC, Inc.
P.O. Box 5050
Long Beach, California 90805

Gentlemen:

Pursuant to Section 3062 of the California Vehicle Code, you are hereby notified of GMC Truck & Coach Division's intention to franchise for GMC Truck products an additional heavy duty truck dealership to be established on Norwalk Boulevard just north of Telegraph Road, which location is presently serviced by the Santa Fe Springs, California Post Office.

Very truly yours,

/s/ J. E. Jacklin
J. E. Jacklin, Manager
Dealer Organization Dept.

JEJ/das

cc: Mr. Sam W. Jennings,
Executive Secretary
New Motor Vehicle Board
2415 First Avenue, P.O. Box 31
Sacramento, California 95801

Proof of Service By Mail (1013a, 2015.5 C. C. P.)

State of California, County of Los Angeles

I am a resident of the county aforesaid: I am over the age of eighteen years and not a party to the within entitled action; my business address is:
595 East Colorado Boulevard, Suite 810, Pasadena, California.

On May 16, 1975, I served the within protest under §3060 and §3062, California Vehicle Code on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California addressed as follows:

General Motors Corporation
Truck and Coach Division
8155 Van Nuys Boulevard
Suite 1030 Panorama Towers
Panorama City, California 91402

General Motors Corp.
Oldsmobile Division
6355 Tapanga Canyon Rd.
Woodland Hills, CA 91364

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 16, 1975 at Pasadena, California

/s/ Lynn Berthel
Lynn Berthel

Exhibit H

State of California—Transportation Agency
New Motor Vehicle Board
2415 First Avenue, P. O. Box 31
Sacramento, California 95801
(916) 445-1888

Certified Mail

May 23, 1975

General Motors Corporation
Truck and Coach Division
8155 Van Nuys Boulevard
Suite 1030 Panorama Towers
Panorama City, CA 91402

Re: Service Oldsmobile-GMC, Inc.: George E. Fuller, George Cashman vs. General Motors Corporation—Protest No. PR-37-75

Gentlemen:

You are hereby notified that Service Oldsmobile-GMC, Inc., 3555 East South Street, Long Beach, California, has filed a protest with the New Motor Vehicle Board under the provisions of Sections 3060 and 3062 State of California Vehicle Code. Accordingly, you are advised that you may not terminate or refuse to continue the franchise of Service Oldsmobile-GMC, Inc., to sell Oldsmobile and General Motors Corporation vehicles until the Board has held a hearing pursuant to Section 3066 of the Vehicle Code and makes its findings and renders its decision. Neither can you establish or relocate the proposed dealership on Nor-

walk Boulevard just North of Telegraph Road in Santa Fe Springs, California, until such hearing has been held pursuant to Section 3066 and the Board has rendered the above-mentioned decision.

In accordance with Section 3066 of the Vehicle Code, the Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,

New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

cc: General Motors Corp.
Oldsmobile Division
6355 Topanga Canyon Road
Woodland Hills, CA 91364

H. Gary Jeffries, Esq.
Elwyn L. Judd

Exhibit I

January 22, 1976

New Motor Vehicle Board
2415 First Avenue
Post Office Box 31
Sacramento, California 95801

Gentlemen:

I received a letter dated January 16th from Chevrolet Motor Division notifying me that they intend to approve the relocation of Muller Chevrolet from 3701 Oceanview Boulevard, Montrose, California to 475 Foothill Boulevard, LaCanada, California.

I wish to advise you that I protest the proposed relocation of Muller Chevrolet from Montrose, California to LaCanada, California.

Yours truly,

Jack Wall Chevrolet, Inc.

/s/ Jack Wall
Jack Wall
President

JW/pjdp

cc: Mr. R. E. O'Brien
Chevrolet Motor Division
1800 Avenue of the Stars
Los Angeles, California 90067

Exhibit J

Letterhead of Fred Bell Chevrolet
6467 Foothill Boulevard
Tujunga, California 91042
Telephone (213) 352-3241

January 21, 1976

Mr. Sam W. Jennings
Executive Secretary
New Motor Vehicle Board
2415 First Avenue P.O. Box 31
Sacramento, California 95801

Gentlemen:

Pursuant to Section 3062 of The California Vehicle Code, you are hereby notified that Bell Chevrolet Inc. takes strong exception and protests of Chevrolet Motor Division's intention to the Relocation of Muller Chevrolet, Montrose, California from 3701 Oceanview Boulevard, Montrose, California to 475 Foothill Boulevard, La Canada, California.

Yours truly,

Bell Chevrolet

/s/ Fred Bell
Fred Bell President

cc: Chevrolet Motor Division
R. E. O'Brien Zone Manager
1800 Avenue of The Stars
Los Angeles, California 90067

FB/el

Exhibit K

State of California—Transportation Agency
New Motor Vehicle Board
2415 First Avenue, P.O. Box 1828
Sacramento, California 95809
(916) 445-1888

Ronald Reagan, Governor

Certified Mail

February 6, 1976

Chevrolet Motor Division
300 Gateway East, Century City
1800 Avenue of the Stars
Los Angeles, CA 90067

Re: Jack Wall Chevrolet, Inc. vs. Chevrolet Motor Division, General Motors Corporation—Protest No. PR-87-76

Gentlemen:

You are hereby notified that Jack Wall Chevrolet, Inc., 3003 East Colorado Boulevard, Pasadena, California 91107, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. Accordingly, you are advised you may not establish or relocate the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership. It is the Board's understanding that the proposed new dealership would be located at:

475 Foothill Boulevard, La Canada, California

In accordance with Section 3066 of the code, the Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,

New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

/jp

cc: Jack Wall
John Holmes

Exhibit L

State of California—Transportation Agency
New Motor Vehicle Board
2415 First Avenue, P.O. Box 1828
Sacramento, California 95809
(916) 445-1888

Ronald Reagan, Governor

Certified Mail

February 6, 1976

Chevrolet Motor Division
300 Gateway East, Century City
1800 Avenue of the Stars
Los Angeles, CA 90067

Re: Bell Chevrolet, Inc. vs. Chevrolet Motor Division, General Motors Corporation—Protest No. PR-88-76

Gentlemen:

You are hereby notified that Bell Chevrolet, Inc., 6467 Foothill Boulevard, Tujunga, California 91042, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. Accordingly, you are advised you may not establish or relocate the proposed dealership, until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership. It is the Board's understanding that the proposed new dealership would be located at:

475 Foothill Boulevard, La Canada, California

In accordance with Section 3066 of the code, the Board shall fix a time and place of hearing and you will be duly notified thereof by registered mail.

Your attorney or agent should file a notice of appearance indicating whether or not you desire to appear at the hearing for the purpose of submitting evidence and oral argument. The notice of appearance, together with proof of service thereof upon the other party, shall be filed with the secretary of the Board within 15 days of the date of this notice.

Very truly yours,

New Motor Vehicle Board

/s/ Sam W. Jennings
Sam W. Jennings
Executive Secretary

/jp

cc: Fred Bell
John Holmes

United States District Court
Central District of California

Case Number 76 1200

[Title omitted in printing]

SUMMONS

To the above named defendant(s):

You are hereby summoned and required to serve upon
plaintiff's attorney, whose address is

O'Melveny & Myers
611 West Sixth Street
Los Angeles, California 90017

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Edward M. Kritzman, Clerk

By .....
Deputy Clerk

(Seal of Court)

Date: April 13, 1976

NOTE: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. Pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, all papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Pursuant to Local Rule 4(g) of this court, the original of all documents, including exhibits to documents, shall be filed with one clear, legible copy for use by the Judge.

United States District Court
Central District of California

No. 76 1200

[Title omitted in printing]

[Filed Apr. 13, 1976]

NOTICE OF REQUIREMENT
OF THREE-JUDGE COURT

Plaintiffs respectfully notify the Court that this cause should be heard before a three-judge district court as required by 28 U.S.C. § 2281 and request that the Court notify the Chief Judge of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 2284 of the filing of plaintiffs' complaint in order that the necessary designation of judges for said court may be made.

Dated: April 13, 1976.

Hahn & Hahn
George R. Baffa

By /s/ George R. Baffa
George R. Baffa
Attorneys for Plaintiff
Orrin W. Fox Co.

Norin T. Grancell
A Professional Corporation
By /s/ Norin T. Grancell
Norin T. Grancell
Attorney for Muller Chevrolet

O'Melveny & Myers
Girard E. Boudreau, Jr.
John G. Niles
Sheldon H. Lytton
By /s/ Girard E. Boudreau, Jr.
Girard E. Boudreau, Jr.
Attorneys for Plaintiff

Of Counsel for Plaintiff
General Motors Corporation
Frazer F. Hilder
General Counsel
By Robert W. Culver

United States District Court
Central District of California

No. 76 1200 LTL

[Title omitted in printing]

[Filed May 7, 1976]

1. NOTICE OF MOTION AND MOTION TO DISMISS ACTION

[Fed.R.Civ.P. 12 (b)]

2. MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ACTION

Notice is hereby given that on Monday, June 7, 1976 at 10:00 a.m. or as soon thereafter as counsel can be heard in the courtroom of the Honorable Lawrence T. Lydick, Judge of the above-named court, at 312 North Spring Street, Los Angeles, California, defendant New Motor Vehicle Board will move and does hereby move the said Court for an order dismissing the complaint and action herein pursuant to Rule 12(b), Federal Rules of Civil Procedure, upon the grounds:

1. That plaintiffs have failed to state a claim upon which relief can be granted, in that the doctrine of abstention compels this Court to decline to exercise jurisdiction hereon until the courts of the State of California have had an opportunity to address the questions presented; and

2. That plaintiffs have failed to join as parties to this action persons required to be joined herein under Rule 19, Federal Rules of Civil Procedure.

Dated: May 6, 1976.

Evelle J. Younger
Attorney General

/s/ Robert L. Mukai
Robert L. Mukai
Deputy Attorney General
Attorneys for Defendant
New Motor Vehicle Board

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ACTION

PRELIMINARY STATEMENT

I *Parties*

In this action for declaratory and injunctive relief, plaintiffs, two new car dealers and the manufacturer which through its several divisions is their common franchisor, seek orders restraining implementation and enforcement of the California Automobile Franchise Act[1], and a judgment declaring the Act invalid under the U.S. Constitution. Plaintiffs seek to enjoin

[1]The statutory provisions challenged by the present action are those sections of the California Vehicle Code added by California Statutes 1973, chapter 996, section 16; amended by California Statutes 1974, chapter 384, section 3 and California Statutes 1975, chapter 653, section 1. The statutory provisions have no authorized title; the term "Automobile Franchise Act," employed by plaintiffs in their complaint, is utilized here as a convenience.

seven ongoing state administrative adjudicatory proceedings now pending before the New Motor Vehicle Board, an administrative tribunal of the State of California.

Defendants herein are the New Motor Vehicle Board of the State of California and its members sued in their official capacities, and the Department of Motor Vehicles of the State of California and its director, sued in his official capacity. Defendant Board is the statewide administrative agency before which are adjudicated certain statutorily-created causes, in the form of protests initiated by new car dealers against intended actions of their franchisors. Neither defendant Department of Motor Vehicles nor its director are necessary parties in these adjudicatory proceedings.

II *The California Automobile Franchise Act*

In 1973 the State of California enacted legislation adding to existing laws the provisions of the California Vehicle Code challenged here, relating to establishment, termination, modification and relocation of automobile sales franchises and dealerships, and providing for adjudication of protests in connection therewith by the New Motor Vehicle Board.

In enacting the 1973 legislation the California Legislature declared its policy and purpose as follows:

> "The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and

that in order to promote the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." Stats. 1973, ch. 996, § 1, p. 1964.

In response to the circumstances identified, the California legislature added to state law new regulatory provisions requiring for the first time that vehicle manufacturers and distributors, as franchisors, provide notice to their franchised dealers prior to taking certain actions affecting the economic interests of the latter as franchisees. The enactment left fully intact all statutory provisions under which dealers, manufacturers, and transporters of motor vehicles have been licensed in California for a number of years. Cal. Veh. Code §§ 11700 et seq.

Under the 1973 enactment (Cal. Veh. Code §§ 3060 et seq.) franchisors are required to provide the affected franchisee and the New Motor Vehicle Board written notice prior to termination, refusal to continue, modification, or replacement of any existing franchise. Cal. Veh. Code § 3060. Prior written notice to the affected franchisee and the Board is also required when a franchisor seeks to establish an

additional dealership or relocated an existing dealership within or into a defined area where the same line-make of vehicle is represented by an existing franchisee. Cal. Veh. Code § 3062.

The Act permits the affected franchisee, upon receiving notice of the franchisor's intent, to protest the intended action before the New Motor Vehicle Board (Cal. Veh. Code §§ 3060, 3062). The Board is vested with authority to hear and determine the protest on the basis of specified statutory criteria (Cal. Veh. Code §§ 3061, 3063) upon a statutorily allocated burden of proof. Cal. Veh. Code § 3066(b). Proceedings before the Board are governed by certain of the provisions of the California Administrative Procedure Act pertaining to administrative adjudication (Cal. Gov. Code §§ 11500 et seq.) Cal. Veh. Code § 3066(a). All final decisions of the Board are subject to judicial review. Cal. Veh. Code § 3068.

ARGUMENT

I

THE DOCTRINE OF ABSTENTION ANNOUNCED IN *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941) REQUIRES THIS COURT TO DECLINE TO EXERCISE JURISDICTION UPON THE PRESENT ACTION

A. The federal forum should abstain from exercise of its jurisdiction when state adjudication is likely to determine dispositive questions of state law, or modify and define issues in aid of determination of federal questions.

In *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), the United States Supreme Court outlined the circumstances whereunder, in a case in which state action is challenged in the federal courts as being contrary to the federal Constitution, abstention by the federal forum is typically appropriate. In the *Pullman* case a carrier asserted that an order of the state railroad commission denied rights under the Fourteenth Amendment and was, under state law, beyond the authority of the promulgating body to make. The carrier sought a decree enjoining enforcement of the commission's order in federal court. The Supreme Court ordered the trial court to abstain from deciding the case until the parties had obtained a decision on the state issues involved, thus to refrain from deciding an issue by making a tentative answer which might be subsequently displaced by a state adjudication. In this manner, the court explained, the federal courts "will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Id.*, at 500.

Abstention under Pullman has been given application when the federal action involves a sensitive area of state policy and when the constitutional issues advanced are premature for federal resolution, as for example where constitutional infirmity in state legislation may be avoided by a narrowing construction in the state courts, or where the challenged statute may be held unconstitutional under state law. *Reetz v. Bozanich,* 397 U.S. 82, 86-87 (1970); *City of Meridian v. Southern Bel. T. & T. Co.,* 358 U.S. 639, 640-641 (1959).

Abstention under *Pullman* has additionally been given application where consideration of state issues by the state courts may not be dispositive but may be expected in the course of litigation to modify and define the federal issues, thus aiding the federal court in a subsequent decision. *Lake Carriers' Assn. v. MacMullan,* 406 U.S. 498, 510-512 (1972); *Harrison v. N.A.A.C.P.,* 360 U.S. 167, 176-178 (1959); *see* Bezanson, *"Abstention: The Supreme Court and the Allocation of Judicial Power,"* 27 Vanderbilt L. Rev. 1107, 1118 (1974).

Abstention under the reasoning of *Pullman* was approved by the Ninth Circuit in affirming dismissal of a suit challenging California's statute for the licensing for naturopathic physicians. In *National Assoc. of Naturopathic Physicians v. California State Board of Chiropractic Examiners,* 442 F.2d 466 (9th Cir. 1971) the Court of Appeals noted that similar contentions had been entertained and resolved in foreign state courts and in other federal courts, but concluded that abstention and dismissal was appropriate. The court stated:

> "Despite the foregoing, we have concluded that we need not now express an opinion upon the merits of the appellant's claim. During oral argument in our court, the appellant's attorney conceded that the appellant has made no effort to challenge the validity of the pertinent California statutes in the courts of the State of California. At the same time, he urged that one recent opinion of a California appellate court strengthened the position of his client. This case is *D'Amico v. Board of Medical Examiners,* 6 Cal.App.3d 716,

86 Cal.Rptr. 245 (1970). In these circumstances, we think that the filing of the appellant's suit in the District Court was premature, that it was in no position to seek the intervention of the federal court before undertaking to obtain relief in the California courts, and that the dismissal by the District Court should be affirmed for that reason. *Reetz v. Bozanich,* 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); *cf. Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).

"Affirmed." *Id.* at 467. *See also Moses v. Kinnear,* 490 F.2d 21 (9th Cir. 1973).

B. Pending state litigation is likely to dispose of the questions presented by the present action, or substantially modify and refine the federal issues herein.

Defendant New Motor Vehicle Board is at present a party in four pending state actions in which challenges to the Automobile Franchise Act have been raised under both federal and state law.

In two related but unconsolidated state actions, intended decisions of the trial court indicate the intention to determine six of the eight federal constitutional challenges brought by plaintiff here, together with state constitutional claims, in favor of the validity of the Act. In *Toyota Motor Distributors Inc. v. State of California, etc., et al.,* (Sacramento Superior Court No. 255959) the intended decision, dated April 29, 1976, upholds the Act and defendant Board's procedures under Vehicle Code sections 3062 and 3066 against challenges by a franchisor under the Supremacy Clause of Article VI of the U.S. Constitution (based on alleged conflict with the Sherman Act), and the due process and equal protection clauses of the Fifth and Fourteenth Amendments respectively. The court's intended decision also rejects claims of invalidity under California Constitution Article I, section 1 (right to acquire, process and protect property) and Article I, section 7 (due process, equal protection of the laws). In *Fresno Imports v. State of California, etc., et al.,* (Sacramento Superior Court No. 255991), decided the same date, the court reached identical issues, to the same result in an action by a franchisee to whom the provisions of Vehicle Code section 3062 were applicable. In an earlier state action, brought by a franchisor to review a final decision of defendant Board arising under the provisions of Vehicle Code section 3060 and 3066, the trial court on November 10, 1975, held that the Act does not afford an impartial tribunal to franchisors as parties before defendant Board, and is violative of both Article I section 7 of the California Constitution and section 1 of the Fourteenth Amendment to the U.S. Constitution. *American Motors Sales Corp. v. New Motor Vehicle Board of the State of California* (Sacramento Superior Court No. 254420), now on appeal to the Third Appellate District (3d Civil 15971).

In *Chrysler Corporation v. New Motor Vehicle Board of the State of California* (Sacramento Superior Court No. 258933), plaintiff franchisor asserts failure to provide an impartial forum in proceedings under Vehicle Code sections 3062 and 3066, and consequent denial of due process under Article 1, section

7 of the California Constitution and section 1 of the Fourteenth Amendment to the U.S. Constitution, and broad claims of unconstitutional violations of freedom of contract, deprivation of property without due process, and conflict with federal statutes "designed to promote competition and prohibit monopolies." An order preliminarily enjoining the Board from proceeding with the pending protest under Vehicle Code sections 3062 and 3066 was issued on March 26, 1976 and has been appealed. The Board's Petition for Supersedeas was denied without prejudice to a motion for calendar advancement on April 1, 1976 (3d Civil 15893).

The four pending actions provide early opportunities for the state appellate court not only to determine issues raised by plaintiffs here, but to decide substantial issues of state law in such a manner as to either obviate exercise of this court's jurisdiction or ripen the existing federal issues for adjudication before the federal forum.

Examples of a potential result obviating federal adjudication are present in both the *Toyota* and *Fresno* cases. In both cases plaintiffs sought declaratory and injunctive relief as well as the prerogative writ of the state court. Among the numerous challenges to the constitutionality of the Act present in both cases are the assertions that the legislation is an invalid exercise of the police power of the state and that the Act constitutes an impermissible delegation of legislative authority. These issues of state law may well be dispositive on appeal in the intermediate ap-

pellate court *(see Allen v. California Board of Barber Examiners,* 25 Cal.App.3d 1014 (1972)) or on review in the California Supreme Court. *See State Board v. Thrift-D-Lux Cleaners,* 40 Cal.2d 436, 440-446 (1953).

Moreover the issue of denial of an impartial tribunal, predicated in all four pending cases upon the statutory composition of the Board, is a matter determined in the *American Motors* case and raised in the *Toyota Motor Distributors* and *Fresno Imports* cases as a question of state as well as federal law. The California appellate courts have not been reluctant to entertain and determine that issue under the California constitution, even where the question has been raised for the first time on appeal. *Bayside Timber Co. v. Board of Supervisors,* 20 Cal.App.3d 1, 14 (1971), hrg. den. 1971.

A final determination of any one of the state constitutional issues against the validity of the Act in any one of the pending state proceedings will of course obviate exercise of this forum's jurisdiction.

Even absent a decision adverse to the Act, an early state court construction of the Act responsive to critical issues of both state and federal law is a virtual certainty.[2] Thus if pending state litigation does not

[2]In *American Motors* the State as appellant, has the burden of reversal of a trial court decision affecting the continued vitality of defendant Board as a Tribunal under Vehicle Code section 3060. In the *Toyota Motor Distributors* and *Fresno Imports* cases appeals by unsuccessful plaintiffs are anticipated from the trial court's decision, holding valid the Board's operations under Vehicle Code section 3062. In the *Chrysler Corporation* case, the State as appellant seeks reversal of an order granting a preliminary injunction against protest proceedings under Vehicle Code section 3062.

obviate exercise of federal jurisdiction altogether, the federal forum will yet benefit from the construction to be provided by the state forum in consideration of both state and federal constitutional issues. Under such circumstances, in ordering abstention in *Harrison v. N.A.A.C.P., supra,* 360 U.S. 167 (1959), the Supreme Court stated the purpose to be served thereby:

> "All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court." *Id.,* at 178.

C. Multiplicity of state remedies is available for presentation of challenges to the Act as well as for judicial review of Board action.

In approving abstention in *Harrison,* the court observed:

> "The Virginia declaratory judgment procedure . . . also provides an expeditious avenue here. And of course we shall not assume that the Virginia courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements." 360 U.S. at 178.

It is appropriate, therefore, to note that the California Supreme Court has held that declaratory relief in state court is available to a party seeking review of an agency decision, for the purpose of challenging the constitutionality of a statute on its face, even where under the doctrine of exhaustion of administrative remedies issues may otherwise be foreclosed if not first raised before the agency. *State of California v. Superior Court (Veta Co.),* 12 Cal.3d 237, 250-251 (1974). Declaratory relief upon a complaint brought prior to commencement of an agency's adjudicatory proceeding has long been available as a remedy in California. *See Eye Dog Foundation v. State Board of Guide Dogs for the Blind,* 67 Cal.2d 536, 543-544 (1967).

It is also established under California law that injunctive relief is available as a remedy upon the same allegations permitting declaratory relief, predicated upon unconstitutionality of the statute. *State of California v. Superior Court (Veta Co.), supra,* 12 Cal.3d at 252. Such relief was sought in the *Toyota Motor Distributors* and *Fresno Imports* cases in conjunction with declaratory relief, in addition to review of the Board's decision by way of prerogative writ under the "administrative mandamus" statute, Cal. Code of Civil Procedure section 1094.5. Preliminary injunctive relief was sought in and obtained from the state court in the *Chrysler Corp.* case, to restrain a pending proceeding before the Board.

The availability of a state procedure adequate to afford a review of administrative action is a factor to be considered in evaluating the necessity for federal intervention. *Alabama Comm'n v. Southern R. Co.,* 341 U.S. 341, 349 (1951). Where as here state remedies permit plaintiffs to tender their state and federal constitutional challenges in declaratory relief and injunction actions, *in addition* to established procedures for review of the agency decision, enter-

tainment of the federal action becomes even less provident. *Askew v. Hargrove,* 401 U.S. 476, 478 (1971).

When, in addition, the multiplicity of available state judicial remedies is considered in conjunction with the existence of substantial issues of state law yet to be finally determined in respect of the legislation challenged here, the state policy reflected in the licensing and regulatory scheme of which that legislation is a part, and the present pendency of active state litigation in which those issues and that policy meet, the case for abstention under *Pullman* is clear. *Reetz v. Bozanich, supra,* 397 U.S. 82 (1970). The present action should be dismissed. *National Assn. of Naturopathic Physicians v. California State Board of Chiropractic Examiners, supra,* 442 F.2d 467 (9th Cir. 1971).

II

PLAINTIFFS HAVE FAILED TO JOIN AS PARTIES TO THIS ACTION PERSONS REQUIRED TO BE JOINED HEREIN UNDER RULE 19, FEDERAL RULES OF CIVIL PROCEDURE

According to the complaint, plaintiffs are each involved in at least two of seven protest proceedings now pending before defendant New Motor Vehicle Board. Plaintiff Orrin W. Fox Co., according to paragraph 13 of the complaint, occupies a position of interest in four proceedings referred to as the *Becherer Buick* and *O'Donnell Buick Opel* cases, identified in complaint paragraphs 12(a) and 12 (c), as Protest Numbers PR-35-75, PR-50-75, PR-36-75 and PR-51-75. According to paragraph 17 of the complaint, plaintiff Muller Chevrolet occupies a position of interest in the two proceedings referred to as the *Jack Wall Chevrolet Inc.* and *Fred Bell Chevrolet* cases, identified in complaint paragraphs 12(d) and 12 (e) respectively as Protest Numbers PR-87-76 and PR-88-76. Plaintiff General Motors Corporation, through its several divisions, appears as a party in all seven protest proceedings.

Though it is clear upon the face of the complaint that Becherer Buick Inc., O'Donnell Buick-Opel, Inc., Service Oldsmobile, Inc., Jack Wall Chevrolet, Inc., and Fred Bell Chevrolet, are each parties protestant in one or more of the administrative proceedings identified in the complaint, none of these entities is joined as a party in this action, seeking to enjoin the very proceedings which they have initiated.

Presumptively each of these parties protestant is possessed of some interest in the subject matter of their respective protest proceedings which is adverse to a correlative interest of plaintiff General Motors and, in at least six cases, likewise adverse to some interest of the respective dealer plaintiffs in this action.

While the exact interests of these parties protestant have not yet been presented to the Board and are thus unknown to this defendant, the substantiality of these interests to the parties is fairly to be inferred from the prayer of plaintiffs that the forum for assertion of those interests be eliminated. A single reading of the complaint thus suffices to demonstrate that any disposition of the present action favorable to plaintiffs is impossible without "as a practical matter impair-[ing] or imped[ing the protestants'] ability to protect

that interest" (Rule 19 (a)(2)(i)), inasmuch as it is the protest procedure which enables these absent parties to protect such interests as they have, and it is that procedure which the plaintiffs seek here to avoid.

It is therefore, exactly because the interests of these parties protestant in the subject matter of their respective protests has as yet received no exposition before defendant Board, that their interest in the subject matter of the present proceeding for injunction is readily identifiable as consisting in the right not to be deprived of a presumptively legal recourse before a presumptively proper administrative forum.

These absent parties, having availed of the authorized procedures available to them under state law, are indispensable parties in this action brought by their adversaries to deprive them of the means to pursue their remedy. Unless they are joined, the action should be dismissed.

CONCLUSION

For each of the foregoing reasons it is respectfully requested that the action herein be dismissed.

Dated: May 6, 1976.

Evelle J. Younger
Attorney General

/s/ Robert L. Mukai
Robert L. Mukai
Deputy Attorney General
Attorneys for Defendant
New Motor Vehicle Board

(Affidavit of Service omitted in printing)

United States District Court
Central District of California

No. 76 1200 LTL

[Title omitted in printing]

[Filed May 7, 1976]

ANSWER

Comes Now defendants Department of Motor Vehicles of the State of California and Herman Sillas as Director of the Department of Motor Vehicles and answer the complaint herein on file as follows:

1. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 4, 7, 8, 9, 12, 13, 14, 15, 16, 17, 20, 33 and 45(b) and therefore deny all of the allegations contained therein.

2. Defendants admit the allegation contained in Paragraphs 10, 11, 19, 21 and 38.

3. Defendants deny each and every allegation contained in Paragraphs 1, 2, 3, 5, 6, 18, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45(a), 45(c), 45(d), 45(e) and 46 of the complaint.

As a First, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

The United States District Court should abstain from deciding this case until the state courts have acted. Abstention Doctrine.

As a Second, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

Indispensable persons have not been joined pursuant to Rule 19 in that the protesting dealers are persons needed for just adjudication and plaintiffs have not joined them.

As a Third, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

Laches.

As a Fourth, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

The complaint fails to state a claim against defendants within the subject matter jurisdiction of this court.

As a Fifth, Separate, and Affirmative Defense to Plaintiffs' Complaint Herein, Defendants Allege as Follows:

The complaint fails to state a claim against defendants upon which relief can be granted.

WHEREFORE, defendants pray that plaintiffs take nothing by reason of their complaint, for judg-

ment for costs herein and for such other and further relief as the court may deem proper.

Dated: May 6, 1976.

Evelle J. Younger
Attorney General

/s/ Stephen J. Egan
Stephen J. Egan
Deputy Attorney General
Attorneys for Defendants
Department of Motor Vehicles
and Herman Sillas

(Affidavit of Service omitted in printing)

United States District Court
Central District of California

No. CV 76-1200-WPG

[Title omitted in printing]

(1) NOTICE OF MOTION BY ORRIN W. FOX CO., MULLER CHEVROLET AND GENERAL MOTORS CORPORATION FOR PARTIAL SUMMARY JUDGMENT

(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

(Three-Judge Court)

NOTICE OF MOTION

Please Take Notice that on July 26, 1976 at 10:00 A.M., or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable William P. Gray, United States Courthouse, 312 North Spring Street, Los Angeles, California, plaintiffs Orrin W. Fox Co., Muller Chevrolet and General Motors Corporation will move for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure specifying that the following issues are without substantial controversy:

1. The California Automobile Franchise Act (California Vehicle Code §§ 3060-69; hereinafter the "Act") violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution:

a. Because the Act deprives motor vehicle manufacturers and their prospective and existing franchisees of liberty and property without prior notice and the opportunity to be heard; and

b. Because following the initial peremptory deprivation of liberty and property, the Act fails to provide for a prompt hearing and decision on the merits of the taking.

2. The Act is invalid under the Supremacy Clause of the United States Constitution because it patently conflicts with the operation and underlying economic policy of the federal antitrust laws (15 U.S.C. §§ 1-7, 12-27).

Plaintiffs will also move for an order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure specifying that there is no just reason for delay and expressly directing the entry of judgment in favor of plaintiffs on the foregoing claims; and for judgment pursuant to said order declaring the Automobile Franchise Act unconstitutional and permanently enjoining defendants, their agents, and any persons acting on their behalf, at their direction or under their control from taking any action to implement or enforce the Act's provisions.

This motion will be made on the grounds that there are no genuine issues of material fact relating to the foregoing claims, and that plaintiffs are entitled to judgment as a matter of law. The motion is based

upon this Notice of Motion and the Memorandum of Points and Authorities attached hereto; upon the affidavits of Messrs. Richard L. Fox, John Muller, James G. McCullough and John G. Niles, and the exhibits to said affidavits, served and filed herewith; and upon all other papers, records, documents and pleadings on file herein.

Plaintiffs respectfully submit that this motion must be heard by a district court of three judges pursuant to 28 U.S.C. §§ 2281 and 2284, and request that such a court be convened.

Dated: June 7, 1976.

Hahn & Hahn
George R. Baffa

By /s/ George R. Baffa
George R. Baffa
Attorneys for Plaintiff
Orrin W. Fox Co.

Norin T. Grancell
A Professional Corporation

By /s/ Norin T. Grancell
Norin T. Grancell
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Chevrolet

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Girard E. Boudreau, Jr.
John G. Niles
Sheldon H. Lytton

By /s/ Girard E. Boudreau, Jr.
Girard E. Boudreau, Jr.
Attorneys for Plaintiff General
Motors Corporation

Of Counsel for Plaintiff
General Motors Corporation:
Frazer F. Hilder
General Counsel
By Robert W. Culver

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Preliminary Statement

On April 13, 1976 plaintiffs Orrin W. Fox Co. ("Fox"), Muller Chevrolet ("Muller") and General Motors Corporation ("General Motors") filed a Complaint for Declaratory Relief and Injunction with this Court, seeking a declaration that California Vehicle Code §§ 3060-69 (hereafter referred to as the "Automobile Franchise Act" or the "Act") are unconstitutional, and an order enjoining further enforcement of the Act.

Although the complaint sets forth various separate claims for relief, only two of these claims are the subject of the present motion ("Failure To Provide Prompt Hearing," Complaint, paragraphs 23 through 27; and "Preemption by Federal Antitrust Laws,"

paragraphs 28 through 31). A judgment in favor of plaintiffs on either claim will, as a practical matter, render the remainder of this action moot.

The Act's constitutional deficiencies are evident from the very language of Vehicle Code §§ 3060-69, and there is no basis for any dispute about the Act's meaning or effect in the two areas described above. Under such circumstances, summary judgment for plaintiffs on these issues is not only appropriate, but represents a particularly desirable and expeditious method for preventing further interference with plaintiffs' enjoyment of rights guaranteed by the United States Constitution. *E.g., Roe v. Wade,* 410 U.S. 113 (1973) (summary judgment declaring Texas' criminal abortion statutes unconstitutional, affirmed); *Barber v. Rader,* 350 F. Supp. 183 (S.D. Fla. 1972) (summary judgment for plaintiff in action to enjoin enforcement of state statutes that permitted ejectment of tenants without prior hearings).

The Court has jurisdiction of this action under 28 U.S.C. §§ 1331(a), 1337 and 1343(3). Section 1331 (a) applies because plaintiffs are challenging the constitutionality of state statutes under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Supremacy Clause, the Contracts Clause and the Commerce Clause. The case thus arises under the Constitution and laws of the United States, and the matter in controversy exceeds $10,000. (Affidavits of James G. McCullough, Richard L. Fox and John Muller.) The case also arises under an "Act of Congress regulating commerce or protecting trade and

commerce against restraints and monopolies" (§ 1337), because plaintiffs are challenging state statutes on the ground that those statutes impose an undue burden on interstate commerce and conflict with the federal antitrust laws. *All American Airways v. Village of Cedarhurst,* 201 F.2d 273, 277 (2d Cir. 1953). Finally, plaintiffs are seeking declaratory and injunctive relief against the deprivation under color of state law of rights (due process and equal protection of the law) secured by the Constitution of the United States. Hence, the Court has jurisdiction under § 1343(3). *Lynch v. Household Finance Corp.,* 405 U.S. 538, 543-52 (1972).

This case must be heard by a district court composed of three judges, because plaintiffs seek to enjoin the enforcement of state statutes on the ground that those statutes are contrary to the United States Constitution. 28 U.S.C. §§ 2281 and 2284; *Steffel v. Thompson,* 415 U.S. 452, 457 n.7 (1974).

II. Summary of Argument

A. *Due Process*

One provision of the Automobile Franchise Act permits existing independent franchised automobile dealers to "protest" to the California New Motor Vehicle Board against the establishment or relocation of any other franchised independent dealer for the "same line-make" of cars within a ten-mile radius of the protesting dealer's location. This "protest" is made simply by sending a letter to the Board. Upon receipt of such a letter, the Board is required by the Act

immediately and *automatically* to enjoin establishment or relocation of the dealership which is the subject of the letter of protest. This is done without prior notice to the affected dealer or manufacturer, and neither the affected dealer nor the manufacturer is afforded an opportunity to be heard prior to the peremptory issuance of the injunctive order. The injunction is indefinite in duration and, because it is issued without prior notice and the opportunity to be heard, constitutes a deprivation of liberty and property in violation of the Fourteenth Amendment to the United States Constitution.*

It must be noted at the outset that the extraordinary injunctive relief afforded private parties by the Act does not occur as the result of careful review and decision by a presumably impartial government official charged with the protection of the public welfare. To the contrary, the Act provides for this extraordinary remedy whenever one or more actual or potential competitors of the affected dealer chooses unilaterally, without any showing of good cause, and absent any judicial or quasi-judicial scrutiny, to invoke it.

None of the recognized limited circumstances of threatened immediate and irreparable injury to the health and welfare of the public are present to justify the peremptory issuance of the injunction. Indeed, it

*Other provisions of the Act which deal with termination or modification of existing franchises suffer from similar constitutional deficiencies, but these provisions are not encompassed within the instant motion.

would be incredulous to suggest that the establishment of relocation of motor vehicle dealerships poses any threat of immediate and irreparable injury to the public welfare. However, even if such circumstances were found to exist, the Act would still be fatally defective under the Fourteenth Amendment because no mechanism is provided whereby the propriety of the issuance of the injunction can be challenged prior to a full hearing on the merits and because the Act fails to require a hearing on the merits promptly following the issuance of the injunction.

B. *Supremacy—Antitrust*

The power of one or more actual or potential competitors unilaterally to invoke the injunctive process of the California New Motor Vehicle Board against other existing dealers or potential dealers within a geographic market area of 314 square miles (that area encompassed within a ten-mile radius) results in a chilling if not freezing effect upon competition. Because of the indefinite duration of the automatic injunction, the practical result of the Act is to permit existing automobile dealers, through their indiscriminate use of legal process, to preclude competitive market entry and to impose unreasonable restraints upon an otherwise free and competitive marketplace including self-serving territorial restraints and market allocations. The horizontal market allocation which results from the invocation of the automatic injunction, regardless of the duration of the restraint, constitutes a *per se* violation of Section 1 of the Sherman Act.

In addition to the immediate and dramatic adverse effect upon competition which results from the automatic injunction, the Act, by failing to permit any challenge to the propriety of the injunction prior to a full hearing on the merits and by failing to require a prompt hearing and final decision following the issuance of the peremptory injunction, results in substantial artificial barriers to the entry of new competition. Absent the effect of the Act, the capital and planning requirements essential to the establishment or relocation of a modern motor vehicle dealership are enormous. Obviously these requirements must be satisfied before the manufacturer and the independent dealer can agree to go forward with the proposed establishment or relocation. Real estate must be obtained and financing arrangements must be made as well as a plethora of other arrangements necessarily incident to the establishment of the business. The ability of the existing or potential dealer to hold all of these elements together during the indefinite period of time within which the automatic injunction may be existent, superimposes upon the already difficult road of entry by a new competitor serious practical difficulties and even greater needs for capital.

As we will show, the patently invidious impact upon competition in the motor vehicle business which results from the Act cannot be insulated from the antitrust laws of the United States by invocation of the narrow state action exemption. Thus, because the Act conflicts with the operation and underlying economic policy of the federal antitrust laws, it must be de-

clared invalid under the Supremacy Clause of the United States Constitution.

The due process and antitrust deficiencies of the Act are discussed in detail in parts V and VI of this memorandum. Part III contains a description of the Act, and part IV describes the parties to this action.

III. The Act

The Automobile Franchise Act was enacted by the California Legislature as Stats. 1973, Ch. 996 § 16 and became effective on July 1, 1974. A copy of the Act as presently in force is attached as Exhibit A to the Complaint.*

Only the Act's franchise establishment and relocation provisions are relevant to the present motion, and they operate in the following manner: Before a new motor vehicle dealership can be established or an existing dealership can relocate, Section 3062 of the Act requires the manufacturer to give written advice of such proposed establishment or relocation to the New Motor Vehicle Board and all dealers for the

*The Act purports to regulate the termination and modification of franchises for motor vehicle dealerships (Vehicle Code §§ 3060-61), the establishment and relocation of such dealerships (Vehicle Code §§ 3062-63), delivery and preparation obligations of franchised dealers (Vehicle Code § 3064), and reimbursement of franchised dealers for warranty service (Vehicle Code § 3065). Other sections of the Act prescribe procedures generally applicable to each of the foregoing subjects. Responsibility for the hearing and determination of disputes arising under the Act is given by Vehicle Code § 3050(b) to the New Motor Vehicle Board, a nine-member administrative agency within the California Department of Motor Vehicles. By statute (Vehicle Code § 3001), the Board must include four members who are new car dealers and five public members.

"same line-make" whose dealerships are within the "relevant market area," which is defined by Vehicle Code § 507 as "any area within a radius of ten miles from the site of the potential new dealership." Any dealer for the "same line-make" within this 314 square mile area may file a "protest" against the proposed establishment or relocation with the New Motor Vehicle Board. When such a protest is filed, Vehicle Code § 3062 mandates that:

> "[T]he board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, *and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing* as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership." (Emphasis added.)

The Act contains no provision for notice or an opportunity to be heard prior to the issuance of this automatic injunction, and no requirement for a prompt hearing following the issuance of such injunction.

Both civil and criminal penalties may be imposed for violations of the Board's peremptory injunctive orders as well as for violations of the Act's establishment and relocation provisions generally. Violations by dealers and manufacturers are punishable as misdemeanors under Vehicle Code §§ 11713.2(1) and 40000.11, and may be grounds for suspension or revocation of a manufacturer or dealer's license

to do business in California under Vehicle Code § 11705(a)(10).

When a hearing finally occurs, it may be before the Board itself or a hearing officer designated by the Board (Vehicle Code § 3066(a); 13 Cal. Adm. Code § 590.)* The hearing is a quasi-judicial proceeding in which the Board or its hearing officer hears evidence presented by the parties and reaches or recommends a decision. (Vehicle Code § 3066(a); Government Code § 11517.) Although strict rules of evidence do not apply, all testimony at the hearing must be under oath, and each party may call and examine witnesses, introduce written evidence and cross-examine opposing witnesses. (Government Code § 11513.) The parties are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of documents at the hearing. (Government Code § 11510.) "Other interested individuals" (including the prospective new or relocating dealer) may present evidence at the hearing, but have none of the procedural rights (such as subpoenas, cross-examination and appeal) accorded parties. (Vehicle Code § 3066(a).)**

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*Discovery in preparation for the hearing, conduct of the hearing itself, and subsequent proceedings are regulated by Vehicle Code §§ 3066-68, by the Board's regulations, and by certain sections of the California Administrative Procedure Act (Government Code §§ 11500 *et seq.*) which are made applicable to protest proceedings by Vehicle Code § 3066(a).

**Although it can be argued that the interests of the enjoined franchisee can be adequately protected by the manufacturer, it should be noted that the enjoined franchisee has under the Act no means of directly attacking the injunction which vitally affects

If the matter is heard by a hearing officer in the first instance, he must prepare and submit a proposed decision to the Board. (Government Code § 11517.) The Act sets no time period within which this proposed decision must be submitted. The Board may affirm or reverse the decision of the hearing officer, decide to take additional evidence or refer the matter to the hearing officer for further proceedings. (Government Code § 11517(c).) If the Board decides that additional proceedings are necessary, the only time limitation on rendition of a final decision by the Board is Vehicle Code § 3067's requirement that the decision be made "within such time as may be necessitated" by the additional proceedings. Any party aggrieved by the Board's decision may seek judicial review, but must do so within 45 days. (Vehicle Code § 3068.)

IV. The Parties

Plaintiff Fox is a California corporation doing business as a dealer for new and used automobiles and trucks at 3456 East Colorado Boulevard, Pasadena, California. Fox holds franchises from American Motors Sales Corporation for American Motors automobiles and from the GMC Truck & Coach Division of General Motors Corporation for GMC trucks. Fox and General Motors have entered into a franchise agreement for Buick and Opel automobiles, but

his individual pecuniary interests. Little imagination is required to formulate a number of situations in which both the immediate and long-range interests of the manufacturer and the enjoined franchisee may differ materially.

protests against this action were filed by the franchised Buick-Opel dealers in Monrovia and San Gabriel, California.* As a result of these joint protests, the Board automatically enjoined Fox and General Motors from going forward and this injunction, which was issued on May 29, 1975, remains in full force and effect today. No hearing of any kind has been held on the merits of these protests. (Affidavits of Richard L. Fox and John G. Niles.)

Plaintiff Muller is a California corporation doing business as a dealer for new and used automobiles and trucks at 3701 Oceanview Boulevard, Montrose, California. Muller holds a franchise from the Chevrolet Motor Division of General Motors for Chevrolet automobiles and trucks. Muller wishes to relocate his dealership to a site in La Canada approximately 2.2 miles from his present location. This relocation is necessary because Muller's present facilities are inadequate. General Motors concurs in Muller's planned relocation, but the Chevrolet dealers in Pasadena and Tujunga have protested the planned relocation.** As a result of these protests the Board, on February 6, 1976, automatically enjoined Muller from relocating

*_Becherer Buick, Inc. v. Buick Motor Division, General Motors Corporation_ (Protest Nos. PR-35-75 and PR-50-75), filed on or about May 22, 1975 and August 6, 1975, respectively; and _O'Donnell Buick-Opel, Inc. v. Buick Motor Division, General Motors Corporation_ (Protest Nos. PR-36-75 and PR-51-75), filed on or about May 22, 1975 and August 6, 1975, respectively.

**_Jack Wall Chevrolet, Inc. v. Chevrolet Motor Division, General Motors Corporation_ (Protest No. PR-87-76), filed on or about January 22, 1976; and _Fred Bell Chevrolet v. Chevrolet Motor Division, General Motors Corporation_ (Protest No. PR-88-76), filed on or about January 21, 1976.

its dealership. This injunction remains in full force and effect and a hearing is scheduled before a hearing officer designated by the Board for August 2-6, 1976. (Affidavits of John Muller and John G. Niles.)

Plaintiff General Motors is a Delaware corporation with its principal place of business in Michigan. General Motors manufactures and sells motor vehicles and motor vehicle parts and accessories throughout the United States, including the State of California. General Motors is the respondent in all four of the administrative proceedings described in the preceding paragraphs. (Affidavits of James G. McCullough and John G. Niles.)

Defendants New Motor Vehicle Board and Department of Motor Vehicles have already been identified. Defendants Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian and John B. Vandenberg are duly appointed members of the New Motor Vehicle Board, and defendant Sam W. Jennings is the Board's Executive Secretary. Defendant Herman Sillas is Director of the Department of Motor Vehicles. (Affidavit of John G. Niles.)

V. The Automobile Franchise Act Deprives Motor Vehicle Manufacturers and Their Existing and Prospective Franchisees of Liberty and Property Without Due Process of Law.

A. *Due Process Requires Prior Notice and the Opportunity to Be Heard.*

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive

any person of life, liberty, or property, without due process of law."

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), Mr. Justice Jackson wrote that:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that *at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing* appropriate to the nature of the case." (Id. at 313; emphasis added.)

This fundamental principle has been repeatedly reaffirmed by the Supreme Court. *E.g., Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339-40 (1969); *Boddie v. Connecticut*, 401 U.S. 371, 377-378 (1971); and *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). In *Boddie v. Connecticut, supra,* the Court elaborated as follows:

> ". . . The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, 'within the limits of practicability,' [*Mullane*] at 318, a State must afford to all individuals a meaningful opportunity to be heard

if it is to fulfill the promise of the Due Process Clause." (401 U.S. at 378-79; emphasis in original.)

These constitutional considerations are equally applicable to judicial deprivations of property and to quasi-judicial deprivations imposed by other governmental agencies. *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 304-05 (1937). In the judicial arena, for example, the Fifth and Fourteenth Amendments have required the imposition of severe limitations on the grant of prohibitory orders at preliminary stages of litigation.

Under Rule 65(a) of the Federal Rules of Civil Procedure, a court may not grant a preliminary injunction without notice to the adverse party and a hearing. Moreover, any application to a court for injunctive relief must be reviewed in light of the principle that:

> "The grant of a preliminary injunction is the exercise of a very far reaching power *never to be indulged in except in a case clearly warranting it.*" *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). (Emphasis added.)

The standards set forth for the issuance of ex parte restraining orders are even more severe; Rule 65(b) of the Federal Rules of Civil Procedure permits such ex parte orders only if the applicant can clearly show that immediate and irreparable harm will befall him before notice can be given and a hearing had. *See, Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964), *aff'd*, 384 U.S. 890 (1966); 7 Moore's Federal Practice ¶¶ 65.05-65.06, pp. 65-75 through 65-77.

The emphasis on notice and hearing—even in situations demanding immediate action—was made clear in the Advisory Committee Note to the 1966 Amendments to Rule 65(b), a statement implicitly approved by the Supreme Court's adoption of the 1966 Amendments and by its opinion in *Carroll v. President & Commissioners of Princess Ann*, 393 U.S. 175 (1968). The Committee Note stated:

> "In view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done." (39 F.R.D, at 124).

The duration of restraining orders granted *ex parte* is also subject to significant limitations. Rule 65(b) of the Federal Rules limits such orders to ten days.*

As the above discussion demonstrates, the injunctive power of the judiciary is subject to severe constitutional limitations and to extensive statutory controls designed to insure that such constitutional limitations are implemented in the court's granting of this extraordinary remedy. If the power of the fed-

*For "good cause shown" the order may be extended an additional ten days. Under Section 527 of the California Code of Civil Procedure, the permissible duration of such a state court order is fifteen days or, if good cause is shown, twenty days.

eral judiciary is so circumscribed by the United States Constitution so too must be the power of state administrative agencies.

The Automobile Franchise Act quite obviously fails to meet this constitutional standard. The Act permits any motor vehicle dealer to obtain an automatic injunction against the establishment or relocation of a competitive dealership within 10 miles, without prior notice and the opportunity to be heard and without any showing of immediate necessity. The injunction thus obtained interferes substantially with the right of manufacturers to market motor vehicles through a network of franchised dealers at locations best suited to maximize sales and service to the public, with the right of prospective dealers to enter the motor vehicle business, and with the right of existing dealers to do business at locations where profit opportunities exist and where business operations can be conducted economically.* The Act's effect is particularly invidious when an existing dealer's facilities are condemned, destroyed by natural disaster or rendered unavailable through inability to renew a lease, because that dealer's competitors can enjoin the continuation of his business if even the slightest relocation is involved.

The Act's provision for a hearing at some later date does not cure this fundamental constitutional deficiency. In the first place, it is irrelevant that the

*There can be no doubt that these rights are protected under the Fourteenth Amendment. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) and discussion in Part V B. *infra*.

deprivation of liberty and property inflicted by an automatic injunction under Vehicle Code § 3062 is not permanent. As the United States Supreme Court stated in *Fuentes v. Shevin, supra:*

> "*[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.* . . . The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. . . . While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, *it is not decisive of the basic right to a prior hearing of some kind.*" (407 U.S. at 84-86; emphasis added.)

Moreover, "temporary" may be an overgenerous characterization of the deprivation of liberty and property imposed by the Automobile Franchise Act. As noted in Part III of this Memorandum, the Act places no limitation on the time within which the Board must act to schedule a hearing, no limitation on the time within which a hearing officer's proposed decision must be submitted to the Board, and no limitation on the time within which the Board must render a final decision if it deems additional proceedings necessary.

In addition, the establishment or relocation of a motor vehicle dealership is not one of those "extraordinary" situations where some valid governmental interest justifies deprivation of liberty or property without a prior hearing. Three cases cited by the Supreme Court in *Sniadach v. Family Finance Corp.,*

supra, 395 U.S. at 339, provide examples of the very limited circumstances under which such action is appropriate. In both *Fahey v. Mallonee*, 332 U.S. 245 (1947) and *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928) the Supreme Court upheld statutes permitting governmental agencies summarily to seize operational control of banking institutions in serious financial difficulty. And in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), the Court validated a procedure permitting summary seizure of misbranded drugs by the federal Food and Drug Administration.

The factors that justified summary action in *Fahey*, *Coffin Bros.* and *Ewing*, however, are totally absent in the present case.* First, summary action was taken in those cases to benefit the general public, not to serve the interests of a private individual or a single class of individuals. Both *Fahey* and *Coffin Bros.* were based on the potentially widespread and serious consequences of bank failures, and *Ewing* on the even more important interest in safeguarding public health. Here, however, an automatic injunction against franchise establishment or relocation serves only the private interests of existing dealers by inhibiting competition. Indeed, such an injunction is actually contrary to the public interest in effective competition and adequate, convenient facilities for vehicle sales and service.

*The factors discussed in this and succeeding paragraphs are similar to those identified by the California Supreme Court in *Randone v. Appellate Department*, 5 Cal. 3d 536, 554, 96 Cal. Rptr. 709 (1971).

Secondly, the summary procedures sanctioned by the Supreme Court were pursuant to narrowly drawn statutory schemes designed to permit summary deprivation only when the delay occasioned by a prior hearing could result in serious harm to the public, and only after a finding of immediate necessity by a responsible public official, who might reasonably be expected to serve the general welfare rather than private interests. In *Ewing*, for example, the federal Food and Drug Administrator was authorized to act only after finding probable cause that misbranded drugs would endanger health or mislead customers. No similar need for immediate action exists in Automobile Franchise Act cases. The establishment or relocation of a motor vehicle franchise cannot possibly be construed as posing a grave and immediate threat of injury to the public welfare. Moreover, the Act is devoid of even the most fundamental safeguards against abuse of its summary remedy. A Vehicle Code § 3062 injunction against franchise establishment or relocation issues automatically upon application by an existing dealer. No allegation or showing of need for immediate action is required and no judgment about the necessity for such action or the merits of the protest is made by any state official.

Finally, *Fahey, Coffin Bros.* and *Ewing* were all cases in which the property appropriated did not vitally affect an individual's life or livelihood. Quite the opposite is true of an injunction against franchise establishment or relocation, especially when a relocation results from circumstances beyond the dealer or

manufacturer's control. Under the Act, a dealer who is forced to relocate by an Act of God or by losing his lease is subjected to the risk that one of his competitors will enjoin his relocation and thus put him entirely out of business. A statutory scheme that permits such a result clearly violates the fundamental requirements of due process under the Fourteenth Amendment.

B. *The Rights of "Liberty" and "Property" Guaranteed by the Fourteenth Amendment Include the Right to Engage in a Lawful Business.*

One element of the "liberty" guaranteed by the Fourteenth Amendment is the right to engage in a lawful business or occupation. As the United States Supreme Court held in *Meyer v. Nebraska*, 262 U.S. 390 (1923):

> "Without doubt, [the term liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (*Id.* at 399; emphasis added.)

The foregoing language has been repeatedly quoted by federal courts in decisions recognizing the existence of due process protection against governmental interference with the right to engage in a variety of

professions. *E.g., Feinberg v. Federal Deposit Ins. Corp.*, 522 F.2d 1335, 1340 n.8 (D.C. Cir. 1975) (bank president); *Keker v. Procunier*, 398 F. Supp. 756, 760 (E.D. Cal. 1975) (attorney); *Simmonds v. Government Employees' Service Comm'n*, 375 F. Supp. 934, 938 (D. V. I. 1975) (government employee); *Ortwein v. Mackey*, 358 F. Supp. 705, 712 (M.D. Fla. 1973) (teacher); and *Larkin v. Bruce*, 352 F. Supp. 1076, 1077 (E.D. Wis. 1972) (doctor).

The right to engage in a profession of one's choice is equally a part of the right of property guaranteed by the Fourteenth Amendment. In *Goldberg v. Kelly*, 397 U. S. 254 (1970), Mr. Justice Brennan observed for the Court that:

> "Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that '[s]ociety today is built around entitlement. *The automobile dealer has his franchise*, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. . . .' Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965)." (*Id.* at 262 n.8; emphasis added.)

And, to the extent that Fourteenth Amendment property rights are created and defined by reference to state law—see *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)—it is abundantly clear in California that "every individual possesses as a form of prop-

erty the right to pursue any lawful calling, business or profession he may choose." *Edwards v. Fresno Community Hosp.*, 38 Cal. App. 3d 702, 705, 113 Cal. Rptr. 579 (1974). There is also no doubt that this right is one of constitutional dimension. In *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 79 Cal. Rptr. 77 (1969), the California Supreme Court declared:

> "[T]he state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation. Any limitation on the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness; courts sustain such limitations only after careful scrutiny." (71 Cal. 2d at 579.)

In *Purdy & Fitzpatrick* the court struck down a labor code section that prohibited the employment of aliens on public works projects. See also *O'Hagen v. Board of Zoning Adjustments*, 19 Cal. App. 3d 151, 159, 96 Cal. Rptr. 484 (1971) (right to operate drive-in restaurant); and *Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd.*, 30 Cal. App. 3d 494, 500-01, 106 Cal. Rptr. 340 (1973) (right to engage in business as a new car dealer).

VI. The Automobile Franchise Act Conflicts With the Federal Antitrust Laws, and Is Therefore Invalid Under the Supremacy Clause.

That portion of the Act which permits one or more actual or potential competitors unilaterally to invoke the injunctive process of the New Motor Vehicle

Board against other existing dealers or potential dealers within the 314 square mile "relevant" market area is akin to the classical horizontal territorial and market allocations which have been repeatedly described as "naked restraints of trade with no purpose except stifling of competition" and which have uniformly been held to constitute *per se* violations of Section 1 of the Sherman Act. See, *e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Because the injunction is automatic and because there is no requirement for a prompt hearing on the merits following the peremptory issuance of the injunction, existing dealers are able to protect, for an indefinite duration, the 314 square mile area within which they do business from the entry of new competition and as well from the relocation of existing dealerships with which they already compete.*

In *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), the court examined a franchising policy that operated in a manner almost identical to the establishment and relocation provisions of the California Vehicle Code. Under that policy, when a prospective franchisee applied for a Holiday Inn franchise, a site inspection was per-

*Moreover, because of the increased financial burden and other procedural difficulties which are posed by the potential new competitor being required "to hold his deal together" pending a final determination on the merits, the distinct possibility exists that even if the establishment of new competition is finally approved, the potential new competitor may in the interim fall by the wayside.

formed by the company to obtain relevant market data, including information about existing inns of any type in the area. The company's franchise sales department then sent written notices of the franchise application, termed "radius letters," to at least three of the Holiday Inns nearest the proposed site. Upon receipt of such notice, the company's franchisees could, if they wished, comment upon or protest establishment of the proposed franchise.

The court found that the radius letter policy, as applied in connection with American's application for a Holiday Inn franchise at the Newark, New Jersey airport, permitted existing franchisees to exercise a "veto of sorts" which precluded "further intrabrand competition" and thereby allowed those existing franchisees to divide the market among themselves. The court held that such conduct constituted a horizontal market allocation in violation of Section 1 of the Sherman Act. (521 F.2d at 1242-43.)

The similarity between the provisions of the Act which permit automobile dealers to preclude and deter new competitive entry and the situation in *American Motor Inns, supra,* is apparent. Both schemes give existing franchisees veto power over the establishment or relocation of a competitive franchise. While the role of Holiday Inns is here played by the New Motor Vehicle Board, this distinction is immaterial because the Board is required automatically to issue an injunction against establishment or relocation whenever a protest is filed. Thus, the question of whether an injunction precluding competition shall

or shall not issue is solely within the hands of the protesting dealers, just as the power to veto new competitive entry in *American Motor Inns* was solely within the hands of the existing franchisees.

Because the Act permits and promotes conduct clearly condemned by the antitrust laws of the United States, the Act is in conflict with the operation and underlying economic policy of those federal statutes. The Act is thus invalid under the Supremacy Clause of the United States Constitution, as explained by the Supreme Court in *Perez v. Campbell*, 402 U.S. 637 (1971):

> "As early as *Gibbons v. Ogden*, 9 Wheat. 1 (1824), Chief Justice Marshall stated the governing principle—that 'acts of the State Legislatures . . . [which] *interfere with*, or are contrary to the laws of Congress, made in pursuance of the Constitution,' are invalid under the Supremacy Clause. *Id.* at 211. . . . '[i]n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (402 U.S. at 649; emphasis by the Court.)

The Automobile Franchise Act's patently invidious impact on competition in the motor vehicle business cannot be insulated from the federal antitrust laws by invocation of the narrow state action exemption set forth in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. In that case, the Supreme Court held that California statutes regulating the marketing and pricing of raisins were exempt from the Sher-

man Act, even though a similar program of price control would have violated the Act if effected by a combination of private parties.

Parker v. Brown cannot be interpreted as conferring a blanket exemption from the federal antitrust laws for all state regulations, however, because the state statute involved in that case was consistent with a clearly expressed national policy. This distinction was explained by the court in *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) as follows:

> "Since the Court [in *Parker v. Brown*] found the state regulation harmonious with the federal agricultural regulatory scheme, the Supreme Court could safely find that Congress had no intent to have the already existing antitrust laws forbid this type of state action, *i.e.*, state agricultural regulation. The Congress had already enacted a federal Agricultural Adjustment Act which was inconsistent with the application of the previously existing federal antitrust laws in this area, the congressional agricultural statute was of equal dignity with the antitrust statute, and the state agricultural action was harmonious with the federal regulation; hence, the Supreme Court did not apply the prohibitions of the antitrust laws to this type state regulatory action." (444 F.2d at 936.)

The reason for subjecting restrictive state regulation to such close and careful scrutiny is that the national policy of free competition is one of paramount importance. That policy, as reflected in the

antitrust laws, has been repeatedly characterized as a "charter of freedom," *Appalachian Coal v. United States*, 288 U.S. 344, 359 (1933), and as the "Magna Carta of free enterprise," *United States v. Topco Associates, Inc.*, 405 U. S. 596, 610 (1972), so that immunity therefrom may not lightly be assumed or implied.

The intent of Congress to preserve and enhance competition in the retail motor vehicle business was manifested in the federal Automobile Dealers' Day in Court Act (15 U.S.C. §§ 1221-25; hereafter the "Federal Dealer's Act"). That law, enacted in 1956, gives franchised automobile dealers the right to sue their franchising manufacturer for acts or threats of coercion or intimidation in connection with the performance or termination of any franchise agreement. Section 1224, however specifically provides that:

> "No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States."

The preeminent importance of antitrust policies in this area was confirmed by the House Committee on the Judiciary, in its report on the bill that became the Federal Dealer's Act. The committee stated that:

> "The bill does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. The committee emphasizes

that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. *Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objective of this legislation.* Under the bill, a manufacturer does not guarantee the dealer profitable operation or freedom from depletion of investment." (H. R. Rep. No. 2850, 84th Cong., 1st Sess. (1956); emphasis added.)

The California Automobile Franchise Act is precisely the sort of "curtailment" of normal competition that the House Judiciary Committee regarded as "inconsistent with the antitrust objective" of the Federal Dealer's Act. The Automobile Franchise Act creates substantial practical barriers to entry into the retail motor vehicle business in California. An automatic injunction against franchise establishment or relocation—while theoretically directed to the motor vehicle manufacturer—imposes a hardship primarily on the small businessman who owns, or attempts to establish, a motor vehicle dealership. It is this individual, not the manufacturer, who must obtain a dealership site and purchase, lease or construct suitable improvements. A small businessman of limited resources may well find it impossible to maintain a lease or option on real estate and necessary financing arrangements for the extended period of time before there is any hearing and determination of a protest under the present statutory scheme. Under these circumstances, delay will serve to "lock out"

new dealers just as effectively as outright prohibition.

The Automobile Franchise Act's franchise establishment and relocation provisions cannot qualify for exemption under *Parker v. Brown*, but instead must be viewed as essentially private action which ". . . stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Perez v. Campbell, supra,* quoting from *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In sum, the Act is clearly repugnant to the stated objectives of Congress to preserve free and open competition, and must therefore be declared invalid under the Supremacy Clause of the United States Constitution.

VII. Conclusion

For all of the reasons set forth hereinabove, plaintiffs' motion for partial summary judgment should be granted.

Dated: June 7, 1976.

Respectfully submitted,
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United States District Court
Central District of California

No. 76-1200-WPG

[Title omitted in printing]

AFFIDAVITS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT OF

(1) RICHARD L. FOX
(2) JOHN MULLER
(3) JOHN G. NILES

AFFIDAVIT OF RICHARD L. FOX
IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

Richard L. Fox, being duly sworn deposes and says:

1. I am the President of, and majority stockholder in, the Orrin W. Fox Co., an automobile dealership located at 3456 East Colorado Boulevard, Pasadena, California. The Orrin W. Fox Co., a California corporation, was founded by my father in 1930, and has remained primarily a family business from that time to the present. From 1958 onward, my dealership has been franchised by American Motors Sales Corporation with respect to the sale of

American Motors (AMC) automobiles, and, from 1933 onward, has also been a franchised General Motors Corporation (GMC) truck dealership. This dealership provides the primary means whereby I earn my livelihood.

2. Because I have been active in Pasadena community affairs for many years, and have served two terms as President of the Pasadena Motor Car Dealers Association, I was aware that Buick's Pasadena dealer terminated his franchise in the early part of 1974. I was further aware in August of 1974 that Buick, which had been represented in Pasadena for more than 40 years, had not established a replacement dealer. I inquired of Buick's Southern California Zone Manager as to the possibility of my dealership obtaining the Buick's Pasadena franchise.

3. On April 1, 1975, Buick formally offered my dealership the opportunity to become the franchised Buick outlet in the Pasadena area. I accepted that appointment on April 7, 1975, and the Dealership Sales and Service Agreement was executed between my company and Buick, effective May 2, 1975.

4. Thereafter, Buick delivered to my dealership 47 Buick and Opel automobiles, for which I paid Buick the sum of $231,866.32. I financed that payment by utilization of my dealership's line of credit at Security Pacific National Bank, and incurred significant interest expenses in connection with that financing. In order to fulfill the obligations I had assumed under the Dealership Sales and Service Agreement with respect to servicing Buick and Opel

automobiles, I purchased from Buick a large inventory of parts. The total cost of this inventory, which I paid to Buick, was $33,300.68. I did not finance this sum, but rather paid the full amount to Buick out of my own operating capital.

5. After my company was granted the Buick franchise in May of 1975, I placed advertising in a variety of communications media, including the Los Angeles Times and the Pasadena Star-News, announcing my dealership as the Pasadena outlet for Buick and Opel automobiles. I also engaged in a direct mail campaign. My total advertising costs in this start-up period were $6,107. At or about the same time, I began selling Buick and Opel automobiles to the public.

6. On June 12, 1975, an individual who identified himself as M. P. McDonagh, a representative of the California Department of Motor Vehicles, appeared at my dealership and advised Ralph A. Thorson, an officer and director of my company, that my sales of Buick and Opel automobiles were prohibited by the order of the California New Motor Vehicle Board and therefore constituted a violation of Vehicle Code Section 3062. Mr. McDonagh further advised that, if I did not cease such sales immediately, the Department of Motor Vehicles would take disciplinary action which could result in the loss of my dealership license. I thereupon ordered all sales discontinued and subsequently sought legal counsel.

7. On July 17, 1975, I was advised by my counsel that, after lengthy consultation with the Department

of Motor Vehicles and the New Motor Vehicle Board, he had received a letter from the Department of Motor Vehicles. This letter, dated July 11, 1975, stated, in part, that the Buick and Opel franchise issued my company was proscribed by law and was therefore inoperable, and that if my company were to certify on an application for registration of a new vehicle that it had a valid Buick franchise, or if it advertised or communicated with prospective purchasers so as to indicate that it was a Buick or Opel dealer, it would be in violation of the law.

8. Shortly after the Board's prohibition against my dealership went into effect, I was advised by my counsel and by counsel for General Motors that a hearing was scheduled in the protests by Becherer Buick and O'Donnell Buick-Opel for August 11 and 12, 1975. I had hoped the matter would be resolved at that time and that I would be allowed to begin again the business of a Buick dealership. I believed 1976 would be what events have proven it to be: a year of economic recovery with respect to automobile sales. However, there was no hearing in August and, in fact, resolution of the protests concerning my dealership has been repeatedly delayed. It has now been more than 11 months since the Board first prohibited my company from selling Buick and Opel automobiles in the Pasadena community.

9. The Board's prohibition has barred my dealership from participating in the 1976 Buick model year, thereby losing the revenues and profits I would have otherwise derived, and has also caused other

economic hardships. My dealership incurred interest and demonstrator expenses amounting to $10,281 in connection with financing the Buick and Opel automobiles which I was not allowed to sell. When it became clear there would be no August hearing, I finally ended that particular financial drain by returning to Buick all the new Buick and Opel automobiles which were still on my lot. The interest paid, some $7,865, represents a loss. I have also lost all of the sums which I spent on advertising in connection with Buick and Opel automobiles. The inventory of spare parts which I purchased represents a largely unproductive drain on my working capital since the Board's prohibition prevents me from holding myself out as a Buick dealer able to provide factory authorized service. Yet another loss resulting from the Board's prohibition is the $8,450 I spent in connection with training my personnel to sell and to service Buick automobiles, and remodeling of my Parts Department in order to add additional capacity for Buick parts. All told, the Board's prohibition on my doing business as a Buick dealer has resulted in losses to date, including lost profits, far in excess of $10,000.

10. The injury I have suffered as a result of the events described above that I cannot calculate in monetary terms is the damage to my reputation in the Pasadena community. The Orrin W. Fox Co. was founded by my father 46 years ago, and from that time until the present, the company's single most important asset has always been its outstanding reputa-

tion for honesty and integrity. That reputation has been severely damaged over the last 11 months because my company, which held itself out of the Pasadena community as a responsible Buick dealership, has been unable to sell automobiles as it promised.

11. There are franchised dealerships in Pasadena representing nearly every make of automobile, whether of domestic or foreign manufacture, except for Buick. The following list indicates the makes of automobile and the dealers selling those automobiles in the Pasadena market:

Make	Dealer and Pasadena Address
Lincoln, Mercury and Capri	Foothill Motors 1339 Green Street
Chrysler and Plymouth	Pasadena Chrysler Plymouth 2965 East Colorado Boulevard
Volkswagen and International Trucks	Transocean Motors 130 North Sierra Madre
American Motors and GMC Trucks	Orrin W. Fox Co. 2456 East Colorado
Ford	Loud Ford 1355 East Colorado
Pontiac and Peugeot	Steiner Pontiac 270 North Lake Street
Dodge	Wegge Dodge 1021 East Colorado
Chevrolet	Jack Wall Chevrolet 3003 East Colorado
Austin, Jaguar, M.G., Triumph, Land Rover, Fiat, Alfa Romeo, and Rolls Royce	Peter Satori Co. 325 West Colorado

Cadillac	Bill Symes Cadillac 3475 East Colorado
Datsun	Pasadena Datsun 101 South Arroyo Parkway
Toyota	Toyota of Pasadena 2014 East Colorado
Porsche and Audi	Rusnak Porsche-Audi 337 West Colorado
Honda	Honda of Pasadena 1965 East Foothill
Jeep	Milne Brothers 1951 East Colorado
Mercedes-Benz and Volvo	Lloyd Pearson, Inc. 2025 East Colorado
Oldsmobile, Jensen and Lotus	Crown Oldsmobile 1253 East Colorado
Mazda	Pasadena Mazda 1285 East Colorado

/s/ Richard L. Fox
Richard L. Fox

(Jurat omitted in printing)

AFFIDAVIT OF JOHN MULLER IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

John Muller, being duly sworn according to law, deposes and says:

1. I am the President and principal shareholder of Muller Chevrolet, a California corporation doing busi-

ness as a dealer for new and used automobiles and trucks at 3701 Oceanview Boulevard, Montrose, California. My dealership is franchised by the Chevrolet Division of General Motors Corporation for Chevrolet automobiles and trucks. This dealership provides the primary means whereby I earn my livelihood.

2. I acquired the dealership now known as Muller Chevrolet in October of 1973, by taking over the Chevrolet outlet which then existed at the Oceanview Boulevard address. Although I own some of the land used for parking and storage of automobiles at my dealership, I do not own the land and buildings which constitute the principal physical facility itself—that is, the showroom and service stall areas. I lease the showroom and service stall areas from Mr. Theodore Gudenger. At the time I took over the dealership, I was aware that the physical facility was too small for the volume of sales and service business that I hoped to transact, and that either extensive alterations or relocation would ultimately be necessary. In that regard, I entered into a letter agreement on October 1, 1973, modifying my Chevrolet Car and Standard Truck Sales and Service Agreement (the Dealer Agreement). In this modification, I acknowledged that the existing Oceanview Boulevard facility was inadequate and that it was to be used by my company on a temporary basis only. I further agreed to take all steps necessary to provide a much larger dealership facility.

3. By the time I had been in business for some sixty days, I realized that size was not the only de-

ficiency of the Oceanview Boulevard facility, but that, in addition, there were other deficiencies so enormous as to render the physical plant totally inadequate to house an automobile dealership. This situation has become progressively worse over the last two years. The building housing the showroom and offices is presently in a state of total disrepair. The roof leaks so badly that, during rain storms, it is necessary to place a number of buckets on the showroom floor. The facility has been inspected by officers of the Fire Prevention Bureau of the Glendale Fire Department, and I have been given written notice by these officers that portions of the facilities are in violation of fire safety standards, and that certain enumerated repairs (the cost of which I estimate to be in excess of $5,000) must be made. I am aware that failure to comply with this notice and a continuing course of violation could result in sanctions against my business. In addition to the fire safety problems, the main building is suffering from termite damage. I have inspected the foundation of the building myself, and have found extensive and visible termite damage. The building also suffered damage in the major earthquake of February, 1971, including cracks and warpage in the walls. Despite my entreaties, the lessor, Mr. Gudenger, refuses to undertake any necessary repairs with respect to the problems I have described in this paragraph.

4. In November of 1973, I began looking for new facilities in the area surrounding the Oceanview Boulevard location. It soon became apparent to me that

vacant land or existing structures capable of housing an automobile dealership were extremely scarce in the immediate area, and that locating such facilities would —and, as it turned out, did—require an enormous amount of time and effort. Over the next year, I was able to locate only two acceptable sites. One site, approximately four and one-half acres of vacant land on Verdugo Road near the Foothill Freeway in LaCanada, was available in the early part of 1974, but I was not able to consummate an agreement regarding the lease of this land. The second site came to my attention in late 1974 when I learned that the owners of the Volkswagen dealership located at 475 Foothill Boulevard, LaCanada, California, were considering moving their franchise to a different location, thereby raising the possibility that the Foothill Boulevard facility would become available.

4. The Foothill Boulevard site appeared most promising, and therefore I engaged in negotiations and discussions with the principal shareholder of the Volkswagen dealership, William A. Dewey, and with the owner of the property, Continental Financing Company, with respect to my moving to that location. Continental Financing Company was represented in these discussions by Robert Smith and Bud Lacey, who indicated they were the principal shareholders of that company. These negotiations and discussions, which spanned a one-year period from December, 1974 to December, 1975, were both complex and time-consuming, particularly because of the following: (a) My being able to take over the LaCanada facility was

contingent upon Mr. Dewey acquiring another site for his dealership; (b) It was necessary to reach an agreement with Messrs. Smith and Lacey with respect to the terms and conditions of my leasing the property; and (c) It was necessary to reach an agreement with Mr. Dewey regarding my purchase of all of the equipment and furniture of his dealership. By December of 1975, all three of these matters had been resolved, in that Mr. Dewey informed me he had located and reached a tentative agreement for another facility, I had arrived at an agreement with Continental Financing with respect to the terms of my proposed lease of the property, and I had agreed to buy all of Mr. Dewey's equipment and furniture for a purchase price of $60,000.

5. Because protests have been filed against the relocation of my dealership, and because that relocation has now been prohibited by the California New Motor Vehicle Board, I must attempt to hold together all of the various aspects of my arrangements until after the protest is resolved. I do not know at this time if those arrangements can be maintained for the many months it will take to obtain a hearing and a decision by the California New Motor Vehicle Board with respect to my dealership's relocation. I am particularly concerned about lengthy delays because both Robert Smith and Bud Lacey of Continental Financing have told me that other parties are interested in leasing the LaCanada facility and that, in the event Mr. Dewey should move his dealership before such time as I could enter into a lease, Continental Financing would not

allow the property to stand vacant waiting for my relocation, but would lease it to someone else. Such an eventuality would effectively prevent my relocating at all. I am not aware of any other facilities presently available in the immediate area that are capable of accommodating an automobile dealership such as mine. Moreover, if I am not allowed to relocate, I face the possibility that the physical deterioration of the dealership building or the actions of the Glendale Fire Department will necessitate closing or vacating that facility, which would effectively mean putting my dealership out of business.

6. In the meantime, my business is severely handicapped because the present facility simply lacks the space to accommodate the numbers of persons who need automobile service. Nearly every morning my dealership is open for business, people bringing their cars in for service are forced to line up out on the street because there is no room for them in my service facility. This situation has become steadily worse, and recently, I have begun to actually turn away service business.

7. The losses of sales and service business incurred by my dealership because of the order prohibiting its relocation have been in excess of $10,000, and said losses will continue so long as the order remains in effect.

/s/ John Muller
John Muller

(Jurat omitted in printing)

Affidavit of John G. Niles In Support of Motion For Partial Summary Judgment

State of California
County of Los Angeles—ss.

John G. Niles, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of O'Melveny & Myers, a member of the bar of this Court, and one of the attorneys of record for plaintiff General Motors Corporation in this action. I have personal knowledge of the facts stated in this affidavit, and if called as a witness I could and would testify thereto under oath.

2. I am also one of the attorneys of record for General Motors in four administrative proceedings now pending before the California New Motor Vehicle Board. Those cases are styled *Becherer Buick, Inc. v. Buick Motor Division, General Motors Corporation* (Protest Nos. PR-35-75 and PR-50-75), filed on or about May 22, 1975 and August 6, 1975, respectively; *O'Donnell Buick-Opel, Inc. v. Buick Motor Division, General Motors Corporation* (Protest Nos. PR-36-75 and PR-51-75), filed on or about May 22, 1975 and August 6, 1975, respectively; *Jack Wall Chevrolet, Inc. v. Chevrolet Motor Division, General Motors Corporation* (Protest No. PR-87-76), filed on or about January 22, 1976; and *Fred Bell Chevrolet v. Chevrolet Motor Division, General Motors Corporation* (Protest No. PR-88-76), filed on or about January 21, 1976.

3. The *Becherer Buick, Inc.* and *O'Donnell Buick-Opel, Inc.* cases are protests by franchised Buick-Opel dealers in Monrovia and San Gabriel, California, respectively, against the granting of Buick and Opel franchises to the Orrin W. Fox Co. in Pasadena, California. The New Motor Vehicle Board has enjoined the establishment of this franchise pending a hearing on these protests, and Exhibits E and F to the Complaint in this action are true copies of the Board's injunctive orders. No hearing on the merits of these protests has yet been held. Although we were advised informally on June 2, 1976 that the Board has scheduled these protests for hearing before a hearing officer on September 15, 1976 in Los Angeles, the Board has not yet issued a formal order setting the hearing.

4. The *Jack Wall Chevrolet, Inc.* and *Fred Bell Chevrolet* cases are protests against the relocation of Muller Chevrolet's franchise from Montrose, California to a site approximately 2.2 miles away in LaCanada, California. The New Motor Vehicle Board has enjoined this planned relocation pending a hearing on the protests, and Exhibits K and L to the Complaint in this action are true copies of the Board's injunctive orders. No hearing on the merits of these protests has yet been held, although a hearing is now scheduled for August 2-6, 1976 in Los Angeles.

5. I have appeared before the New Motor Vehicle Board on two occasions, and I have attended two of the Board's monthly meetings. The current members

of the Board are John Onesian (President), John D. Barnes, Melicio H. Jacaban, Audrey B. Jones, Thomas Kallay and John B. Vandenberg. Mr. Kallay was recently appointed by the California Senate Rules Committee to serve out the unexpired term of Winfield J. Tuttle, who was a member of the Board when this lawsuit was filed but resigned thereafter. Three seats on the Board are now vacant because, to the best of my knowledge, successors have not been appointed for three Board members whose terms expired in January 1975. The Board's Executive Secretary is Sam W. Jennings.

/s/ John G. Niles
John G. Niles

(Jurat omitted in printing)

United States District Court
Central District of California

No. CV 76-1200-WPG

[Title omitted in printing]

AFFIDIVIT OF JAMES G. MCCULLOUGH IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

State of Michigan
County of Wayne—ss.

James G. McCullough, being duly sworn, deposes and says:

1. I have been employed by General Motors Corporation since 1946, and presently am employed in the State of Michigan. My present position is MANAGER, DEALER ORGANIZATION DEPARTMENT, SALES SECTION, GENERAL MOTORS MARKETING STAFF, GENERAL MOTORS CORPORATION.

2. General Motors is a Delaware corporation, authorized to do and doing business in the State of California, with its principal place of business in Michigan. General Motors manufactures motor vehicles and motor vehicle parts and accessories. As Manager of the Dealer Organization Department, I maintain a listing of all General Motors' franchised dealerships in the United States and am familiar with General Motors' franchise agreements and overall marketing plan, under which the company sells

motor vehicles and motor vehicle parts and accessories to franchised automotive dealers in the United States, including the State of California.

3. In the calendar year 1975, General Motors sold approximately 275,000 motor vehicles to franchised dealers of General Motors located in the State of California. I am generally familiar with the California Automobile Franchise Act, Vehicle Code §§ 3060-3069, inclusive, and the manner in which it operates. Such operation has already resulted in costs to General Motors in excess of $10,000, and, in my opinion, the continuing impact of the present Act on General Motors' business operations in California will produce lost sales far in excess of $10,000.

/s/ James G. McCullough
James G. McCullough

(Jurat omitted in printing)

United States District Court
Central District of California

No. CV-76-1200-WPG

[Title omitted in printing]

AFFIDAVIT OF GORDON S. ROBINSON IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

Gordon S. Robinson, being duly sworn, deposes and says:

1. I am a resident of Los Angeles County and an independent businessman. I have a letter of intent from the GMC Truck & Coach Division of General Motors Corporation to become a GMC truck dealer in Santa Fe Springs, California, and am now in the process of constructing dealership facilities on Norwalk Boulevard just north of Telegraph Road in Santa Fe Springs. I have personal knowledge of the facts stated in this affidavit, and if called as a witness I could and would testify thereto under oath.

2. From 1964 until 1973 I was employed by the Hertz Corporation in various capacities. All of my responsibilities with Hertz had to do with the rental and leasing of trucks, and my final position was as Vice President Fleet Services of the Hertz Corporation's Truck Leasing Division.

3. My experience with Hertz was primarily in the western United States. I became convinced as a result of that experience that the Southern California truck market was an extremely good one, and that I wanted to become a GMC truck dealer in that area. After leaving Hertz in 1973 I devoted my full time to attempting to secure such a dealership.

4. After investigating other possibilities, I focused my attention on the Santa Fe Springs area. I considered the commercial nature of the area, the location of competitive truck dealerships and various other factors, and decided that this would be a particularly desirable area for a GMC truck dealership.

5. In April 1975 I reached a tentative agreement with General Motors for a GMC truck franchise at the Norwalk Boulevard location described above. On April 24, 1975 General Motors sent notice of its intention to enter into a franchise with me to all other GMC truck dealers within ten miles of that location, and three dealers—Service Oldsmobile-GMC, Inc. in Long Beach, Ron Goodwin Pontiac-GMC, Inc. in Fullerton, and Nelson Pontiac in El Monte—filed protests with the New Motor Vehicle Board.

6. On May 8, 1975, immediately after the first of those protests was filed, the New Motor Vehicle Board issued an injunction against going forward with my planned dealership. Separate injunctions were issued by the Board with respect to each of the three protests. I was at that time engaged in discussions with architects and contractors with respect

to construction of dealership facilities, discussions with potential employees for the dealership, and negotiations with various sources of financing for construction of the dealership and inventory maintenance. The Board's injunction made it virtually impossible to continue any of these discussions since I could offer nc assurances about when the protests would be resolved. Contractors were reluctant to bid in the face of inflationary increases in the cost of materials and labor; potential employees were reluctant to commit themselves to a job at some uncertain time in the future; and changing interest rates affected all discussions about financing. The total capital required for a dealership like mine is approximately $1 million, and even without the uncertainty and delay created by an injunction against establishment of the franchise, it is a major undertaking to get that much capital together.

7. One of the protesting dealers, Service Oldsmobile GMC, Inc., was no longer in business at the time it filed a protest, having closed its doors in February 1975. Service Oldsmobile ultimately agreed to withdraw its protest, but not until November 18, 1975.

8. Another of the protesting dealers, Ron Goodwin Pontiac-GMC, Inc., was and is located more than ten miles from my dealership site, and was not therefore entitled to protest under the California Vehicle Code. I am advised that General Motors filed a motion to dismiss Goodwin's protest on this ground, but was told by the Board's Executive Secretary that

such a motion could not be granted in advance of a full hearing on the merits.

9. No hearing was held on the protests against my planned dealership until November 24, 1975, more than six months after the Board issued its injunction. I attended the hearing on November 24. At the outset, before any other proceedings were had, Ron Goodwin Pontiac-GMC, Inc. conceded that it was outside the ten-mile "relevant market area" and voluntarily withdrew its protest. Then, after one day of hearing and before finishing the presentation of its case, the remaining protestant—Nelson Pontiac—also voluntarily withdrew its protest.

10. Despite the fact that all of the protests were withdrawn, the Board's injunction remained in effect until December 23, 1975 because of delays in preparation of the hearing officer's proposed decision and in the Board's action on that decision.

11. I consider myself extremely fortunate to have been able to proceed with my dealership after this delay of more than seven months. I had no source of income during that period of time, and my financial resources were strained almost to the breaking point. My option to purchase the Norwalk Boulevard site expired in October 1975 because the sellers would not renew it (having done so once already), and I was very lucky that no one else purchased the property before I could. If the delay had been any longer I might very well have been unable to proceed with the dealership once I received permission to do so.

12. I incurred several thousand dollars in legal fees as a result of these protests, and of course I lost the profits I might have earned if I had gotten my dealership in operation seven months earlier. While I cannot state a precise amount, I am also certain that my dealership will be more expensive to construct now than it would have been seven months ago, because of rising prices.

/s/ Gordon S. Robinson
Gordon S. Robinson

(Jurat omitted in printing)

United States District Court
Central District of California

No. 76 1200 WPG

[Title omitted in printing]

Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment

I

Preliminary Statement

Plaintiffs have moved for partial summary judgment upon two of their several claims for relief asserted in the present action to enjoin enforcement of the California Automobile Franchise Act.[1] Specifically plaintiffs predicate their present motion upon the claims:

1. That the California Automobile Franchise Act does not require a hearing either prior to, or in reasonably close temporal proximity to, initial administrative action by the New Motor Vehicle Board under the Act, and therefore deprives plaintiffs of protected constitutional rights

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[1]As was indicated in the Memorandum of Points and Authorities filed by defendant New Motor Vehicle Board in support of its motion to dismiss the within action, the provisions of the California Vehicle Code which are challenged here have no authorized title. The term "Automobile Franchise Act", having been initially employed by plaintiffs in their complaint, is utilized here and in defendants' other memoranda as an appropriate convention.

without due process of law, (Complaint, paragraphs 23 through 27); and

2. That the Act conflicts with the operation and underlying economic policy of the federal antitrust laws and is therefore invalid under the Supremacy Clause of the United States Constitution (Complaint, paragrahs 28 through 31).

In their Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment (hereinafter P.S.J.), plaintiffs assert that the foregoing claims present "no basis for any dispute about the Act's meaning or effect" (P.S.J. 5:23-26) and that "[a] judgment in favor of plaintiffs on either claim will, as a practical matter, render the remainder of this action moot." P.S.J. 5:19-21.

While defendants[2] agree that a judgment in favor of plaintiffs upon either such claim will in practical effect be dispositive of this action, defendants submit that the meaning and effect of the Act in the areas of each of plaintiffs' claims present substantial questions of fact which must be litigated and accordingly render summary judgment improper.

For the reasons discussed in Part IV of this memorandum, disposition of plaintiffs' claim of denial of due process of law requires factual determinations concerning the operation of the provisions of the California Automobile Franchise Act upon plaintiffs themselves. Such determinations, in addition to ad-

[2]As employed throughout this memorandum, the term "defendants" refers to the New Motor Vehicle Board and its members and executive secretary, on whose behalf this opposition is filed.

dressing the nature of the alleged rights which the Act is purported to deny, must include consideration of the conduct of the plaintiffs in connection with the requirements of the Act as well as the practical effect of the Act upon the plaintiffs. Defendants' Statement of Genuine Issues in Issues I through VII, those matters as to which defendants contend that questions of fact must be litigated in order to resolve plaintiffs' due process claim.

As is discussed in Part III hereof, plaintiffs' claim that the California Act conflicts with the federal antitrust laws must be evaluated in light of the operation of the statutory scheme itself and in terms of the conduct of the persons of whom action thereunder is required or permitted. Defendants Statement of Genuine Issues identifies, in Issue VIII, the material questions of fact necessary to be resolved in order to dispose of plaintiffs' claim of conflict.

Defendants further submit that even if genuine issues of material fact were, as plaintiffs contend, utterly absent from the case, judgment for plaintiffs upon each of the claims presented must be denied upon the legal premises on which they are advanced.

In order to adhere to a logical framework for discussion of the matters raised herein, defendants will address the "prompt hearing" (Complaint, paragraphs 23-27) and "Antitrust-Supremacy" (Complaint, paragraphs 28-31) claims in reverse order. Defendants propose to demonstrate first that the regulatory provisions embodied in the California Automobile Franchise Act constitute a prima facie valid

exercise of the police power of the state, which exercise is not rendered invalid under the Supremacy Clause by reason of any asserted conflict with federal antitrust law. Defendants will then address the operation of the regulatory provisions and will establish that such operation cannot be said, as a matter of law, to deprive plaintiffs of protected constitutional rights without due process. In the course of discussion of each of these components of plaintiffs' motion for partial summary judgment, defendants will identify, by reference to the state of the present record, the necessities for resolution by trial of the genuine factual issues material to each of the claims discussed.

II

The California Automobile Franchise Act

A. *Perspective*

Persons engaged in the businesses of manufacture and marketing of motor vehicles have long been the subject of regulatory legislation in California. Ever since enactment of California's Vehicle Act of 1923, for example, dealers and manufacturers have been authorized through a special exemption from the vehicle registration requirements of the State, to operate motor vehicles on the public highways in connection with their respective businesses. Cal.Stats. 1923, ch.266 § 46(a). In order to secure this exemption from the generally-applicable registration requirements, dealers and manufacturers were initially required only to apply for certification and special identifying license plates. Cal.Stats. 1923, ch.266 § 46(b).

In 1957, what had previously been a certification procedure became for the first time a licensing provision. Under Cal.Stats. 1957, ch. 1319, § 7, all manufacturers and dealers were required to apply for licenses in order to qualify for and continue to hold the registration exemption. Cal.Veh.Code (1957) § 201. In addition, it became unlawful on and after October 1, 1957, to act as a dealer (though not as a manufacturer) without first having procured such a license from the Department of Motor Vehicles. Cal.Veh.Code (1957) § 200.

Ten years later, the prohibition on unlicensed activity was extended to manufacturers and motor vehicle transporters by Cal.Stats. 1967, ch.557, § 2. Henceforward, it would be unlawful for any person to act as a dealer[3], manufacturer,[4] or transporter[5] without

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[3]A dealer is defined by California Vehicle Code section 285 (subject to exclusions specified elsewhere in the Code and not relevant here) as a person who:

> "(a) For commission, money, or other thing of value, sells, exchanges, buys, or offers for sale, negotiates or attempts to negotiate, a sale or exchange of an interest in, a vehicle subject to registration under this code, or induces or attempts to induce any person to buy or exchange an interest in a vehicle and, who receives or expects to receive a commission, money, brokerage fees, profit, or any other thing of value, from either the seller or purchaser of said vehicle, or
>
> "(b) Is engaged wholly or in part in the business of selling vehicles or buying or taking in trade, vehicles for the purpose of resale, selling, or offering for sale, or consigned to be sold, or otherwise dealing in vehicles, whether or not such vehicles are owned by such person."

[4]California Vehicle Code section 388 defines "Manufacturer" as follows:

> "A 'manufacturer' is any person who manufactures or assembles new motor vehicles subject to registration under this code and who maintains representatives for the purpose

a valid license and certificate issued by the Department of Motor Vehicles. Cal.Veh.Code § 11700.

While California over the years had thus gradually expanded the scope of its regulation of motor vehicle manufacture, distribution and marketing through the licensing function, prior to 1973 the legislature of this State—unlike those of numerous other jurisdictions[6] and the Congress of the United States[7] had not interjected its regulatory authority into relations between franchisor and the retail sales level of the motor vehicle business.

By the end of 1973, however, the growth of the components of the motor vehicle industry subject to state licensure had increased markedly. Since as recently as 1964, the number of licensed motor vehicle dealers alone (not including dealers of motorcycles, trailers and snowmobiles) increased by more

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of contacting dealers or distributors in the state or grants franchises to dealers or distributors in this state. The scope and application of this section shall be limited to Division 2 (commencing with Section 1500)."

[5]Under California Vehicle Code section 645, a "transporter" is, generally, a person other than a tow car operator who engages in the business of moving vehicles for delivery from one location to another.

[6]Eight jurisdictions—Colorado, Georgia, Iowa, Louisiana, Nebraska, Rhode Island, Tennessee and Texas—have created statutory commissions having jurisdiction to adjudicate good cause or justification in connection with proposed establishment of additional franchised dealerships within market areas serviced by existing dealerships.

[7]15 U.S. Code §§ 1221-1225, commonly known as the Automobile Dealer's Day in Court Act, was enacted by Congress in 1956 and creates a federal cause of action in any dealer suffering damage resulting from failure of its manufacturer-franchiser to act in good faith in complying with its franchise agreement or in terminating or refusing to renew its franchise with the dealer.

than 11%, from 6,751 to 7,568. Affidavit of Fred J. Lema, filed herewith.

In addition, in the eighteen-year period between 1955 and the end of 1973 the volume of annual registrations of new motor vehicles (automobiles and trucks only) had increased from approximately seven hundred and forty-two thousand in 1955 to over one million, three hundred seventy thousand in 1973, representing a near-doubling of annual new car sales as between those two calendar years. Affidavit of Robert W. Burgett, filed herewith.

Motor vehicle fees, based on value, which were generated by new vehicle sales (automobile and truck only) for those years likewise increased, from $18,624,490 for 1955, to $38,536,889 for 1973; and total fees for new motor vehicles (automobiles and trucks only) rose from $26,593,194 for 1955 to $73,602,836 for 1973. *Id.*

In 1973, the California legislature announced the following purpose:

> "The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and that in order to promote the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to

insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." Cal.Stats. 1973, ch. 996, § 1.

Accordingly, California enacted the state's first legislation interposing the police power between the new car dealer and his franchisor.

B. *The Act*

Pursuant to the declared purpose "to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally" (Cal.Stats. 1973, ch. 996, § 1), the legislature added the new regulatory provisions which include those California Vehicle Code sections referred to in this action as the Automobile Franchise Act (Cal.Stats. 1973, ch. 996, § 16) effective July 1, 1974.[8]

In substance the Act created new regulatory requirements in several areas of business relations between motor vehicle franchisors and franchisees.[9]

[8]A copy of the Act as currently set forth in California Vehicle Code sections 3060 through 3069, is annexed hereto as an Appendix, and is also correctly reproduced as Exhibit A of the complaint.

[9]California Vehicle Code sections 331.1 and 331.2, respectively, define "franchisee" and "franchisor" as follows:

"§331.1. A 'franchisee' is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code from the franchisor and who sells such vehicles at retail.

"§331.2. A 'franchisor' is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code and who grants a franchise."

The 1973 legislation also established the New Motor Vehicle Board, consisting of nine members (Cal.Veh. Code § 3000) and invested it with particular duties in connection with those several areas of franchisor-franchisee relations.

First, the Act creates specific statutory procedures which must be followed by a franchisor in order to effect a modification, replacement, termination, or refusal to continue a franchise (Cal.Veh.Code § 3060) and establishes criteria for determination whether good cause exists for such action by the franchisor. Cal.Veh.Code § 3061. The New Motor Vehicle Board is empowered, upon the filing of a protest by an affected franchisee, to determine, pursuant to specified procedures and in accordance with the statutory criteria, whether good cause exists for such modification, replacement, termination, or refusal to continue a franchise (Cal.Veh.Code §§ 3050(d); 3060(b), (c)).

Modification, replacement, termination or refusal to renew a franchise in violation of the Automobile Franchise Act is unlawful. Cal.Veh. Code § 11713.2(1).

The Act also requires every franchisor to specify to its franchisees the delivery and preparation obligations of such dealers prior to delivery of new vehicles to retail buyers, limits to such specified obligations the franchisee's responsibility for product liability between it and the franchisor, and requires a reasonable schedule of compensation for work performed in connection with such obligations to be filed with

the Board. Cal.Veh.Code § 3064(a). The reasonableness of the compensation provided for is subject to approval by the Board pursuant to specified protest procedures. *Id.* Further, the Act provides for adequate and fair compensation to the franchisee for parts and labor used to fulfill warranty obligations, requires the franchisor to file a warranty reimbursement schedule with the Board, and, under specified protest procedures, authorizes the Board to determine the reasonableness of the schedule. Cal.Veh. Code § 3065(a).

Finally, and most importantly for purposes of this action, the Act imposes specific procedural requirements upon a franchisor which seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area, as defined,[10] where the same line-make is then represented. Under such circumstances the franchisor is required to notify in writing both the New Motor Vehicle Board and each franchisee in such line-make in the relevant market area, of the franchisor's intention. Within fifteen days of receipt of the notification any such franchisee may file with the Board a protest against the franchisor's intended action. Upon the filing of such protest, the Board must inform the franchisor:

[10]California Vehicle Code section 507 provides:
"The 'relevant market area' is any area within a radius of 10 miles from the site of a potential new dealership."

First, that the protest has been filed;

Second, that a hearing is required to be held pursuant to specific provisions of the Act; and

Third, that the franchisor shall not establish or relocate the proposed dealership until the Board has held the required hearing, nor thereafter if the Board should determine that good cause exists for not permitting such dealership. Cal.Veh.Code § 3062.

Subsequent to issuance of the foregoing notification under section 3062, the Board must—as it must in connection with protests upon any of the other matters over which it exercises its review authority—order a hearing to be held within 60 days from the date of that order and must by copy thereof, notify the franchisor, the protesting franchisee, and all individuals or groups which have requested notification of protests and of decisions of the Board. Cal. Veh.Code § 3066(a). In such hearing:

> "The board, or a hearing officer, designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups and the board shall make its decision solely on the record so made." Cal.Veh.Code § 3066(a).

The procedures under which the hearing is conducted are prescribed by reference to specific provision of the California Administrative Procedure Act (Cal. Gov.Code § 11500 et seq.). In protests against modification, replacement, termination or refusal to continue a franchise, the burden of proof is on the

franchisor to establish the existence of good cause for the proposed action. In all other protests, including protests against establishment or relocation of motor vehicle dealerships, such as are the subject of the present action, the burden of proof is upon the franchisee. In a protest filed under California Vehicle Code section 3062 against such establishment or relocation, the protesting franchisee must prove that there is good cause *not* to permit the proposed action. Ca. Veh.Code § 3066(b).

The elements of proof which the protesting franchisee must establish are identified in California Vehicle Code section 3063, which provides:

> "In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:
>
> (1) Permanency of the investment.
>
> (2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
>
> (3) Whether it is injurious to the public welfare for an additional franchise to be established.
>
> (4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

> (5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

The decision of the Board must be in writing and must contain findings of fact and a determination of the issues presented. Except under specified circumstances, the Board must act within 30 days after either the hearing or the date the Board receives the hearing officer's proposed decision, as the case may be. If the Board does not act within the requisite time, the proposed action of the franchisor is deemed approved. Cal.Veh.Code § 3067.

Judicial review of a final decision of the Board may be sought within 45 days from the announcement of the decision. Cal.Veh.Code § 3068.

To enter into or relocate a franchise in violation of the Automobile Franchise Act is unlawful under California Vehicle Code section 11713.2(1).

III

The Supremacy Clause of the United States Constitution does not render the California Franchise Act invalid

A. *Synopsis of Plaintiff's Contention*

Plaintiffs have argued in support of their motion for partial summary judgment that the provisions of the California Automobile Franchise Act creating a right in a franchised new motor vehicle dealer to protest the proposed establishment or relocation of

other franchises of the same line-make within relevant market areas resembles horizontal territorial and market allocations which have been held to constitute per se violations of Section 1 of the Sherman Antitrust Act (15 U.S.C. §1).

Pointing out that in enactment of the Automobile Dealers' Day in Court Act, (15 U.S.C. 1221-1225) Congress specifically provided that "[N]o provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States" (15 U.S.C. § 1224), plaintiffs argue first that that Act manifests Congressional intent to preserve and enhance competition in the retail motor vehicle business, and ask the Court to find that the California Automobile Franchise Act conflicts with that intent.

Likening the procedure established by Vehicle Code section 3062 to the operation of a "radius letter" policy of Holiday Inns in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), plaintiffs suggest, in adverting to the facts found in that case, that the California Act "give[s] existing franchisees veto power over the establishment or relocation of a competitive franchise." P.S.J. 29:24-25. Upon this basis, and coupled with the assertion that the California enactment is "akin to" horizontal territorial and market allocations prohibited under the Sherman Act, (P.S.J. 27:29-28:9), plaintiffs argue that "[t]he Act is in conflict with the operation and underlying economic policy of [the] federal [antitrust] statutes" and "is thus invalid under the

Supremacy Clause of the United States Constitution. . ." P.S.J. 30:6-11.

B. *The Congress has not Preempted State Regulation of Retail Marketing of Motor Vehicles.*

The claim advanced by plaintiffs under the rubric Supremacy-Antitrust" (P.S.J. 9:3) is itself only superficially "akin to" an assertion of federal preemption as a basis for invalidity of state regulatory legislation. The resemblance between plaintiffs' present claim and a true preemption case is, however, unsupported by the least degree of consanguinity. The reason for this is of course that "[w]hether a federal statute preempts the otherwise lawful authority of a state or local government to regulate in a specific area is a question of Congressional intent" (*Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667, 671 (9th Cir. 1972, aff'd 411 U.S. 624), and the intent of Congress with respect to the right of states to regulate in the area in question here has been given unequivocal expression by the Automobile Dealers Day in Court Act itself. That Act specifically provides:

> "This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which cannot be reconciled." 15 U.S.C. § 1225.

Plaintiffs do not attempt, nor, it is submitted, can they, point to a single express provision of the federal Act with which an express provision of the California

Act directly conflicts. Indeed, the only provision of the federal Act to which plaintiffs directly advert is that section which merely affirms that the antitrust laws of the United States are utterly unaffected by the Automobile Dealers Day in Court Act. 15 U.S.C. § 1225. P.S.J. 32:21-24.

It is apparent, therefore, that plaintiffs' "antitrust-supremacy" claim derives no support from the Automobile Dealers' Day in Court Act, which in two consecutive sections forswears both any purpose to affect the federal antitrust laws (15 U.S.C. § 1225) and any intent to invalidate state law unless a direct conflict is present (15 U.S.C. § 1225). The plain language of the Automobile Dealers Day in Court Act thus leaves no room for the argument that the Congress, in creating a new federal remedy for franchisees against their franchisor, had any intention of either expanding the reach of the antitrust laws or diminishing the effectiveness of state business regulation of motor vehicle marketing.

C. *The California Automobile Franchise Act does not Conflict with the Operation or Policy of the Federal Antitrust Laws*

1. *A determination that the State's exercise of the police power is invalid under the Supremacy clause is justified only when it is demonstrated that such action clearly results in actual conflict with federal law.*

Once it is determined, as defendants submit it must be, that Congress in the Automobile Dealers' Day in

Court Act did not preempt the field of regulation of business relations among motor vehicle franchisors and franchisees, the question which remains for resolution of plaintiffs' claim that the California Automobile Franchise Act is precluded from operation under the Supremacy Clause, is whether the California enactment conflicts with the federal antitrust laws themselves.

In addressing this question the rule is fundamental that actual conflict of the State police power with federal law must be made clearly to appear before the state law will be deemed invalid under the Supremacy Clause. See *Savage v. Jones,* 225 U.S. 501, 533 (1912).

That this requirement applies to a claim of inconsistency of state law with federal antitrust law is no less clearly established. In *Joseph E. Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966), reh.den. 384 U.S. 967, the Supreme Court considered a claim that a New York requirement involving compilation of price information on liquor sales to wholesalers and retailers by distillers was inconsistent with various provisions of the Sherman Act (15 U.S.C. §§ 1-7) and section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13). In rejecting the claim, the Court in *Seagram & Sons* stated the rule applicable to judicial consideration of claims of inconsistency with federal antitrust laws, such as the claim at bar, observing, "In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation

where none clearly exists' Huron Cement Co. v. Detroit, 362 U.S. 440, 446. We find no such clear conflict in the present case." 384 U.S. at 45 (ellipses and brackets in original).

For the reasons set forth in the following sections of this Part, defendants respectfully submit that no clear conflict, such as is required to be demonstrated before a State statute may be found invalid under the Supremacy Clause, has been established, and plaintiffs' motion for summary judgment upon this claim must accordingly be denied.

2. *The American Motor Inns decision does not support plaintiffs' contention that the California Automobile Franchise Act conflicts with the antitrust laws of the United States.*

Analysis of plaintiffs' "Supremacy-antitrust" claim requires the immediate observation that plaintiffs' position assumes that the State action in question herein can be validly compared to private action under the federal antitrust laws. As is more fully discussed in section C-3 of this Part, *infra,* this assumption is mistaken. For the limited purpose of exploration of plaintiffs' contention upon its own terms, however, the present discussion hereinafter assumes the purposefulness of such a comparison without conceding its validity.

The issue presented by plaintiffs' contention is whether the Act, by subjecting an otherwise unilateral and vertically-imposed decision of plaintiff General Motors to limited independent scrutiny by a state

tribunal constitutes a violation of the federal antitrust laws.

Plaintiffs' contention that the California Automobile Franchise Act conflicts with the federal antitrust laws rests squarely and exclusively upon a supposed similarity between the facts found in *American Motor Inns, Inc. v. Holiday Inns, Inc., supra,* 521 F.2d 1230 (3d Cir. 1975) and the provisions of California Vehicle Code section 3062.

In *American Motor Inns, supra,* it was found that Holiday Inns, Inc., a franchisor of 1099 independently owned and operated motor lodges throughout the country, engaged in the following practice upon receipt of an application for a franchise:

> "The normal HI [Holiday Inn] procedure upon receiving an application for a franchise was to send written notices of the application—referred to as radius letters—to at least the three Holiday Inns nearest the proposed location. The recipients of the radius letters were invited to forward to HI their written comments on the application, but were under no obligation to respond. Any replies to the radius letters received by HI were referred to the Franchise Committee, which then reviewed the application." 521 F.2d at 1236.

Plaintiffs' comparison of the Act's procedures with those employed by Holiday Inn is, up to the last point described in the foregoing narrative, reasonably accurate. Though plaintiffs are mistaken in asserting that the New Motor Vehicle Board plays the role of Holiday Inn insofar as notification and invitation to comment are concerned, it is the Board which is

the statutory recipient of such "replies"—that is, protests—as may be made by franchisees in response to the notification of the franchisor.

At this point, however, *American Motor Inns* and the present case part company, for the facts as found by the court in the former case are so vastly dissimilar from the statutory procedures of the New Motor Vehicle Board as to preclude further comparison.

In *American Motor Inns:*

> "[T]he district court found that if, as a result of the radius letters, HI received an objection to the proposed franchise by an existing franchisee, the only definitive action the [Holiday Inn] Franchise Committee could take was to deny the application. It could not approve the application. Once an objection had been lodged, the franchise could be awarded only by the Executive Committee of the Board of Directors of HI. According to the trial judge, in order for the Executive Committee to consider an objection by any existing franchisee, the Franchise Committee must already have recommended that the franchise be granted. In 1972 the Executive Committee reviewed 75 applications for franchises to which one or more existing franchisees had objected, and denied 43 of them. The trial court found as a fact that 'these 43 applications would have been granted but for objections from existing franchisees.'" 521 F.2d at 1236 (footnote citation to District Court opinion omitted).

The policy employed by Holiday Inn in connection with new applications was thus affected with the

following characteristics. The receipt by the Franchise Committee of an objection from an established franchisee resulted in either an outright denial of the application at that level or a non-definitive approval of the application by that Committee. Only in the latter case would the Executive Committee have occasion to consider the application and a majority of the applications so considered was denied.

In contrast, upon receipt of a protest by a franchisee under California Vehicle Code section 3062 the New Motor Vehicle Board informs the franchisor that the latter may not proceed with its proposed establishment or relocation until a hearing has been held and the issues of good cause have been determined by the Board. California Vehicle Code § 3062; see Complaint Exhibits D, E, H, K, & L. Thereafter a hearing is held by the Board pursuant to administrative procedures not challenged here.

In each case brought before it upon a protest filed pursuant to Vehicle Code section 3062, the Board determines upon the basis of the criteria specified in section 3063 whether the protestant has demonstrated that good cause exists for *not* permitting the proposed action of the distributor. Section 3063 requires consideration of existing circumstances such as permanency of investment, injury to the public welfare, effect on the retail motor vehicle business and the consuming public in the area, and:

> ". . . (4) Whether the franchisees of the same line-make in that relevant marketing area are providing adequate competition and convenient

consumer care for the motor vehicles of the same line-make in the market area. . . .

"(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest." Cal. Veh. Code § 3063.

It is only in the event that the Board determines good cause to exist for not permitting the proposed action that any limitation upon establishment or relocation of any franchise arises. A single decision, final upon filing, is issued within the time limits specified by the statute. A failure by the Board to act within the specified time limits results in approval of the franchisor's proposed action. Cal. Veh. Code § 3067.

Thus, notwithstanding plaintiffs' assertion that the similarity between the *American Motor Inns* facts and the procedures established by the Automobile Franchise Act is "apparent" (P.S.J. 29:21-23), the foregoing review discloses the following fundamental dissimilarities.

First, while the Holiday Inn procedure precluded a grant of a franchise by the Franchise Committee—the body which would otherwise authorize the franchise—a protest by a franchisee under the Act operates not to divest the Board of any decision making authority, but rather occasions the exercise of that authority. Cal.Veh. Code § 3050(d).

Second, under the Holiday Inn procedure the only definitive action which the Franchise Committee could

take after receipt of an objection was to deny the franchise application. The Board's authority to approve the dealer's proposed action, on the other hand, is never foreclosed by any act of the protesting franchisee.

Third, the Holiday Inn procedure, which resulted in divestiture of all power in the Franchise Committee to grant a franchise if an objection had been received, permitted the Franchise Committee only to make a recommendation to a higher level of authority in the event it disagreed with the objection. Under the Act, the decision of the Board—whether it approves or disapproves the franchisor's proposed action—is itself administratively final, and subject to review only by the courts. Cal.Veh.Code § 3068.

Fourth, the Holiday Inn procedure requiring a higher level of authority—the Executive Committee—to consider objections when the Franchise Committee disagreed, was found factually by the trial court to result in a majority of the "objected-to" applications being finally denied at that level. Thus, if an "objected-to" franchise application were not denied by the normal franchising authority after receipt of the objection, the application was nonetheless likely to be denied at the higher level to which it would then pass for review. By contrast, in addition to the fact that plaintiffs point to absolutely no facts even suggesting that the New Motor Vehicle Board has any tendency to disapprove more proposed establishments or relocations than it approves, the Act itself requires that the proposed action of the franchisor be deemed

approved if the Board fails to act within the time limits established by California Vehicle Code section 3067. Thus, unlike the Holiday Inn procedure which resulted in a great likelihood of ultimate disapproval once an objection was filed, the California Act itself contemplates ultimate approval of the proposed action in the absence of a Board decision disapproving the action.

The only similarity which the *American Motor Inns* facts can be fairly said to share with the provisions of the California Automobile Franchise Act is that the franchisee objections in *American Motor Inns* and the dealer franchisee protests under the California act issue, if at all, from established franchisees within a given geographical area. Even on this point of comparison, similarity is limited, for two important distinctions are present.

First, the Third Circuit opinion in *American Motor Inns* indicates that the Holiday Inn procedure was to notify existing franchisees "upon receiving an application" (521 F.2d at 1236), that is, before any action by Holiday Inn's Franchise Committee was undertaken at all.[11]

Thus, unlike the Act's protest procedure (and overlooking for the moment the fact that it is the

[11]The reported findings of fact of the District Court (365 F.Supp. 1073 D. New Jersey, 1973) confirm the sequence involved:

> "17. All responses to radius letters are reported to the Franchise Committee of HI by the Franchise Sales Department when an application for a new franchise is submitted to that committee."

365 F. Supp. at 1079.

Board, rather than the franchisor, which receives the franchisee protest under the Act), Holiday Inn's policy permitted franchisees to act to foreclose new competition by objecting before any franchisor action was proposed or even contemplated. In contrast, the California act permits protests only remedially, in response to proposed franchisor actions of which the franchisee has notice. Cal.Veh. Code § 3062. Thus the Holiday Inn practice, which permitted prophylaxis, in effect, against competition in its most embryonic and incipient form, may have warranted the status assigned it by the Third Circuit as a *per se* violation of the Sherman Act (5 U.S.C. § 1), where practices under a private procedure more comparable to California's would not: it is, of course, precisely the anticipatory stifling of incipient competition which characterizes those territorial market practices for which the Supreme Court has reserved the designation of "*per se* unreasonable." *United States v. Topco Associates,* 405 U.S. 596, 607 (1972); *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 5 (1958).

A second and related distinction consists in the fact that all objections involved in *American Motor Inns* were in opposition to the grant of franchises (521 F.2d at 1236), that is, establishment of new franchises (See 365 F.Supp. 1073, 1089, 1090), and as such were affected in all cases with either the purpose, or the effect, or both of preventing competition. No such conclusion is possible in respect to the California act's operation upon the present record, for plaintiffs have proved neither the purpose of protest-

ing franchisees to prevent competition, nor the existence of anticompetitive effect resulting from franchisee action.

Thus the similarity between the Holiday Inn policy and the California Automobile Franchise Act's procedures, urged on the basis of franchisee initiation protest mechanisms, if superficially apparent, is far from real. On the record before the Court it simply cannot be said whether operation of the California act results, in *any* case, in anticompetitive effect, much less that a *per se* violation of the Sherman Act is present. Territorial limitations, if vertically imposed, do not constitute *per se* violations and, because they may or may not have the purpose or effect of restraining competition, are subject to analysis under the "rule of reason." *White Motor Co. v. United States,* 372 U.S. 253, 261-263 (1963). The Automobile Franchise Act does not, by interposing the police power of the State between conception and fructification of such otherwise vertically-imposed business decisions of plaintiff General Motors, give rise to a violation of the Sherman Act.

3. *Plaintiffs' claim of conflict with federal antitrust law is unsupported by any legal justification or factual basis and is wholly inadequate to justify summary judgment.*

   a) Plaintiffs request the Court impermissibly to infer a conflict upon the basis of merely speculative possibility of potentially unlawful conduct.

The Supreme Court's discussion of its refusal to find a clear conflict in *Seagram & Sons v. Hostetter, supra,* 384 U.S. 35 (1966) is highly instructive in evaluation of the case advanced by plaintiffs in support of the present motion for summary judgment. The Court in *Seagram & Sons* initially noted that the challenged State statute imposed "no irresistable economic pressure on appellants to violate the Sherman Act" 384 U.S. at 45. The Court went on to hold that although it was "possible to envision circumstances" under which antitrust violations might be compelled by the New York statute, "the existence of such potential conflicts is entirely too speculative in the present posture of this case to support the conclusion that New York is foreclosed from regulating liquor prices in the manner it has chosen" 384 U.S. at 46.[12]

Examination of the posture of plaintiffs' case discloses the very same deficiencies generally identified by the Supreme Court in refusing to find the New

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[12]Lest the suggestion appear that the Court placed its rejection of the antitrust conflict claim upon the Twenty-First Amendment, or that that holding should be delimited by recognition of the scope of state power to regulate liquor under that Amendment, it should be noted that the Court in the *Seagram & Sons* opinion specifically observed:

> ". . . [the challenged provision of the New York statute] appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country. *Nothing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act against such a conspiracy.* United States v. Frankfort Distilleries, 324 U.S. 293, 299."

384 U.S. at 45-46, emphasis supplied.

York statute in conflict with federal antitrust law in *Seagram & Sons, supra,* for plaintiffs' claim of inconsistency of the California act with federal antitrust law is devoid of legal or factual support. Rather, it is on the basis of speculation, and on this basis alone, that plaintiffs ask the Court to impermissibly infer a conflict with "the operation and underlying economic policy of the federal antitrust laws". Proposed Findings of Fact & Conclusions of Law (Proposed Conclusion of Law No. 4) 13:14-17.

As discussed in the immediately preceding section of this Part, plaintiffs' attempted comparison between the provisions of the California Automobile Franchise Act and the facts of the *American Motor Inns* decision—the sole authoritative factual discussion on which plaintiffs rely to support their claim of the Act's invalidity as a horizontal market restraint—fails in at least six points. In particular, the role of the established franchisee as protestant under the Act is on the present record so lacking in evidentiary articulation of purpose and resulting anticompetitive effect as to make impossible any meaningful determination upon the question whether restraint of trade has occurred. In this connection the *per se* rule to which plaintiffs allude (P.S.J. 27:29-28:9) would not, in an action based upon private conduct, relieve the plaintiff of thee (sic) necessity of establishing anticompetitive effect unless that conduct itself fell within the limited class of practices which themselves constitute *per se* violations of the Sherman Act. See, e.g., *United States v. Socony Vacuum Oil Co.,* 310 U.S.

150 (1940) (price fixing agreements); *United States v. Topco Associates,* 405 U.S. 596 (1972); *United States v. Sealy, Inc.,* 388 U.S. 350 (1967) (horizontal market division agreements); *Radiant Burners, Inc. v. People's Gas Light & Coke,* 364 U.S. 656 (1961) (group boycotts, or concerted refusals to deal) but see, as holding group refusal to deal not a *per se* illegal boycott, *McQuade Tours v. Consolidated Air Tour Manuel Committee* (5th Cir. 1972) 467 F.2d 178, cert. den. 409 U.S. 1109). Because the record is barren of any proof covering the nature of the acts of protesting franchisees or any party to this action as purportedly constituting anticompetitive conduct, reference to the *per se* rule in argument (P.S.J. 28:1-9) adds nothing to plaintiffs' position. In the absence of any evidentiary basis sufficient to invoke the *per se* rule to plaintiffs' benefit, the present record is *a foritori* insufficient to support judgment for plaintiffs under the "rule of reason" analysis to which market allocation decisions are normally subject. *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963). See *United States v. Arnold Schwinn & Co.,* 388 U.S. 365, 376 (1967).

The statute which is before the Court contemplates no allocative purpose of competitors, either among themselves, horizontally, or as between themselves and their franchisor. Rather, in recognizing the reality of commercial disagreement and dispute which attends the otherwise unilateral and vertically-imposed decisions respecting sites of franchise establishments and relocations, and in resolving to apply

the police power to that aspect of the new motor vehicle business, the California legislature provided that the authority of the franchisor to impose such decisions would no longer be exclusive but would, in disputed cases, henceforth be exercised subject to absence of disapproval by the State. Evidencing no purpose to minimize competition, the statute mandates the New Motor Vehicle Board to examine the proposed action of the franchisor under five specified criteria, as applicable to the case before it, and provides for no prohibition on the proposed action unless it is demonstrated by the protestant that good cause exists for not permitting the action.

Considering the present summary judgment motion in light of the foregoing, it must be concluded that the conditions precedent to a finding of invalidity under the Supremacy Clause of Article VI have not been met. As in *Seagram & Sons, supra,* no pressure, irresistable or otherwise, to violate the Sherman Act is brought to bear by the provisions of the California Automobile Franchise Act. Moreover, even though it might be possible, as in *Seagram & Sons, supra,* "to envision circumstances" in which antitrust violations might occur (384 U.S. at 46), their existence has not been shown. Indeed, the Court in *Seagram & Sons, supra,* refused to find such a conflict even while conceding the possibility that circumstances could exist in which antitrust violations might be *compelled* by the challenged state statute. 384 U.S. at 46. In the present case, nothing in the law, the record, or plaintiffs' argument suggests even the remotest possibility

that the Act might compel conduct made illegal by federal antitrust law.

b) The acts of defendants undertaken pursuant to and in effectuation of the terms of the California Automobile Franchise Act do not violate the prohibitions of the Sherman Act.

Even if the Court were to conclude that violation of the federal antitrust laws were anything other than a mere possibility under the California Automobile Franchise Act, this conclusion would not render the acts of the defendants under the statute a violation of the Sherman Act. In *Parker v. Brown,* 317 U.S. 341 (1943) the Supreme Court examined the contention that the California Raisin Proration Act, which authorized establishment of marketing programs by state officials upon the petition of ten producers within a given zone, to restrict competition among the growers and maintain prices in distribution to packers. The Court noted that "[t]he declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the state". 317 U.S. at 346. Rejecting the claim that the Sherman Act had been violated, the Court specifically assumed that the program would have violated the Sherman Act if organized and effectuated solely by a contract, combination or conspiracy of private persons. 317 U.S. at 350. The Court then stated.

"But it is plain that the prorate program here was never intended to operate by force of indi-

vidual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 350-351.

Observing that the Sherman Act made no mention of the state as such, the Court observed that there was no suggestion of a purpose to restrain State action in the Act's legislative history. Thus, the Court concluded:

". . . Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . .

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352.

Plaintiffs argue, however, that *Parker* does not exempt the present state action from the reach of the Sherman Act "because the state statute involved [in *Parker*] was consistent with a clearly expressed national policy." P.S.J. 31:5-9. Citing *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C.Cir. 1971), cert. den. 404 U.S. 1047, plaintiffs assert that the basis for the *Parker* holding rested on recognition that Congress had already enacted the Agricultural Adjustment Act, with which the California regulation was consistent, and which was itself inconsistent with the antitrust statute. P.S.J. 31:13-30, citing 444 F.2d at 936.

The fallacy of this assertion consists in the assumption that consistency of the California regulation with the federal Agricultural Adjustment Act formed a part of the *Parker* court's analysis of the Sherman Act question. In reality, consistency of the California program with federal agricultural legislation forms no part of the Court's discussion of the antitrust claim; in fact, it was only in response to the additional challenge that the California program conflicted with and was superseded by federal agricultural marketing legislation that the Court had any

occasion to consider the question of consistency of the state program with the Agricultural Adjustment Act. This issue was addressed (317 U.S. at 352-359) only after the antitrust challenge had already been resolved (317 U.S. at 352); and no discussion of any inconsistency between the federal agricultural and antitrust acts appears in the Court's analysis of either claim.

In its most recent explication of the *Parker* holding, the Supreme Court in *Cantor v. Detroit Edison Co.*, No. 75-122, 44 L.W. 5357 (announced July 6, 1976) makes it clear that the limiting explanation of the *Parker* rule, espoused by plaintiffs in reliance on *Hecht, supra,* is unjustified.

In *Detroit Edison* the Court addressed a private action against a state regulated utility which, in addition to providing electricity, supplied light bulbs to its customers without separate charge, pursuant to tariffs filed and approved by the State. As a defense to the private action against the utility alone, alleging restraint of competition in the sale of light bulbs in violation of the Sherman Act, Edison argued that because its tariffs were approved by the State of Michigan and could not be revised to discontinue its lamp supply program unless the State likewise approved the revision, its program was exempt from antitrust attack under *Parker v. Brown.* Denying the defense, the Court's decision reflects the independence of *Parker's* antitrust holding from the extraneous limiting considerations asserted by plaintiffs. In a

plurality opinion by Mr. Justice Stevens, the Court flatly stated:

> "The Court [in *Parker*] held that even though comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act[21]"

44 L.W. at 5360. (Footnote[21] reciting relevant language from *Parker,* omitted.) Pointing out that in the case then before it, unlike *Parker,* the only defendant was a private utility, and that there was no claim that any state action violated the antitrust laws, the Court held that "[s]ince the case now before us does not call into question the legality of any act of the State of Michigan or any of its officials or agents, it is not controlled by the *Parker* decision." 44 L.W. at 5361.

The present case, on the other hand, is squarely within the holding of *Parker v. Brown, supra.* The New Motor Vehicle Board, its members and its executive secretary, the Department of Motor Vehicles and its Director, are of course all entities and officials of the State of California. It is an act of the State of California which is challenged by this action. As was explicitly recognized by the Court in *Cantor, supra,* ". . . the only way the legality of any program can be tested under the Sherman Act is by determining whether the persons who administer it have acted lawfully." 44 L.W. at 5363. No act of defendants complained of in the present case has occurred other

than by virtue of the California statute. Nor is there present, under the Act or by virtue of any official conduct here in question, any attempt to confer antitrust immunity upon private action otherwise violative of the Sherman Act, and no such violation has been established by plaintiffs.

Thus insofar as plaintiffs seek to restrain acts of the defendants undertaken pursuant to the California Automobile Franchise Act, as constituting participation in a program allegedly violative of the Sherman Act (P.S.J. 33:19-28), the attempt must fail under the rule of *Parker v. Brown.*

IV

Absence of a statutory requirement of a hearing prior to or in close temporal proximity to initial administrative action by the new motor vehicle board does not deny plaintiffs due process of law

A. *Synopsis of Plaintiffs' Contentions*

Plaintiffs' contentions as to the law and the facts upon which their claim of lack of due process is founded, are best identified by plaintiffs' responses to interrogatories propounded by defendants herein. In defendants first interrogatories each plaintiff was requested to state whether it contended that it had been deprived of property or protected constitutional rights without due process of law under the California Automobile Franchise Act. Each plaintiff responded affirmatively. Plaintiffs were each asked, in connection with their affirmative responses:

First, to identify each property or form of property of which plaintiff asserted it had been deprived;

Second, to identify each protected constitutional right of which plaintiff asserted it had been deprived; and

Third, to state each fact upon which plaintiff bases its contention that it has been deprived of property and/or protected constitutional rights without due process of law under the California Automobile Franchise Act.

(Defendants' First Interrogatories, Interrogatories 2(a), (b), (c).)

Plaintiffs answered, without specific objection but under a general objection for lack of relevance set out in the preamble to their respective Answers to Interrogatories, as follows.

General Motors Corporation:

"Answer and Objection to Interrogatory No. 2

"Plaintiff General Motors interprets this Interrogatory as one addressed to the claim for relief stated in paragraphs 23-27 of the Complaint herein ('Failure to Provide Prompt Hearing'), and answers accordingly.

"a) The Act has impaired plaintiff's right to engage in the lawful business of motor vehicle manufacture, assembly and distribution in California; deprived plaintiff of the benefits that would have been derived from the establishment or relocation of retail automobile franchises to

serve the marketing needs of General Motors and the sales and service needs of the public; and caused plaintiff to incur and pay substantial out-of-pocket expenses.

"b) Plaintiff was deprived of the rights identified in the answer to subpart (a) of this Interrogatory by the Board's issuance of an injunction against the establishment or relocation of motor vehicle franchises without prior notice and the opportunity to be heard. For this reason, and because of the Act's failure to require a prompt hearing thereafter, plaintiff has been deprived of rights guaranteed to it by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and other constitutional provisions.

"c) The operation of the Act has deprived plaintiff of property and protected Constitutional rights without due process of law because, under the Act, the Board is required to issue an injunction against the establishment or relocation of a motor vehicle franchise immediately and automatically following the application therefor by any franchised dealer for the 'same line-make' of motor vehicles whose dealership is located within ten miles of the new or relocated dealership. The Act denies due process because it fails to provide for notice and an opportunity to be heard prior to the issuance of such injunctions, and because it fails to require a prompt hearing thereafter."

"General Motors' Answers and Objections to Defendants' First Set of Interrogatories," pp. 5, 6 (dated June 30, 1976).

Orrin W. Fox Co.:

"Answer and Objection to Interrogatory No. 2

"Plaintiff Fox interprets this Interrogatory as one addressed to the claim for relief stated in paragraphs 23-27 of the Complaint herein ('Failure to Provide Prompt Hearing'), and answers accordingly.

"a) The Act has deprived plaintiff of the right to engage in business as a franchised dealer for Buick & Opel automobiles in Pasadena; deprived plaintiff of the benefits that would have been derived from said franchised dealership; caused plaintiff to incur and pay substantial out-of-pocket expenses; and caused plaintiff to suffer significant damage to its excellent business reputation in the Pasadena Community.

"b) Plaintiff was deprived of the rights identified in the answer to subpart (a) of this Interrogatory by the Board's issuance of an injunction against the establishment of a Buick & Opel motor vehicle franchise without prior notice and the opportunity to be heard.

"Orrin W. Fox Co.'s Answers and Objections to Defendants' First Set of Interrogatories," pp. 4, 5 (dated July 6, 1976).

The remainder of plaintiff Fox's answer to subpart (b), and said plaintiff's answer to subpart (c) of Interrogatory No. 2 are identical to the answers of plaintiff General Motors Corporation to those subparts and are omitted in the interest of brevity.

Muller Chevrolet:

"Answer and Objection to Interrogatory No. 2

"Plaintiff Muller interprets this Interrogatory as one addressed to the claim for relief stated in paragraphs 23-27 of the Complaint herein ('Failure to Provide Prompt Hearing'), and answers accordingly.

"a) The Act has deprived plaintiff of the right to engage in business as a franchised dealer for Chevrolet cars and trucks in new and larger quarters in LaCanada, California; deprived plaintiff of the benefits that would have been derived from increased motor vehicle sales and service in said new quarters; and caused plaintiff to incur and pay substantial out-of-pocket expenses.

"b) Plaintiff was deprived of the rights identified in the answer to subpart (a) of this Interrogatory by the Board's issuance of an injunction against the relocation of its motor vehicle franchise without prior notice and the opportunity to be heard. . . ."

"Muller Chevrolet's Answers and Objections to Defendants' First Set of Interrogatories," pp. 4, 5 (dated July 1, 1976).

The remainder of plaintiff Muller's answer to subpart (b), and its answer to subpart (c) of Interrogatory No. 2 are, like the responses of plaintiff Fox, identical to the answers of plaintiff General Motors Corporation to those subparts and are omitted in the interest of brevity.

In substance, each plaintiff asserts what amounts to an interference with a business expectancy, toward

realization of which out-of-pocket expenses had been incurred and paid. In General Motors Corporation's case, "impairment of the right to engage in the lawful business of motor vehicle manufacture, assembly and distribution in California" is asserted in addition to the expectancy of benefits which would have been derived from more immediate realization of its proposed actions. In plaintiff Fox's case, deprivation of the right to engage in business as a franchised dealer for Buick and Opel automobiles in Pasadena, and of attendant benefits, is identified. Plaintiff Muller asserts deprivation of the right to engage in business as a Chevrolet franchisee in new and larger quarters in LaCanada, and of attendant benefits.

The respective plaintiffs each assert the foregoing interferences as impairments and deprivations of rights which result from issuance of "an injunction" by the New Motor Vehicle Board without prior notice and opportunity to be heard. Each plaintiff asserts that the California Automobile Franchise Act denies due process because it fails to provide for notice and opportunity to be heard prior to such issuance, and fails to require a prompt hearing thereafter.

B. *The Action of the New Motor Vehicle Board Required to be Taken Upon the Filing of a Protest Under the California Automobile Franchise Act, Does Not Constitute Issuance of an Injunction Against Plaintiffs.*

Since at least as early as the Supreme Court's decision in *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935), it has been established that state regulation of business, even when it

constitutes an intrusion into the manner in which an individual may practice his profession, does not itself amount to "an arbitrary interference with liberty and property and thus violate the requirement of due process of law." 294 U.S. at 611. So well settled is the foregoing proposition that again, as early as 1955, the Court held unequivocally that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations omitted]" *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 488 (1955), reh.den. 349 U.S. 925.

Plaintiffs purport, however, to raise something more than objection merely to the fact of regulation itself, and assert that such inconvenience as occurs to their ability to conduct their respective businesses is violative of due process by reason of the administrative event by which the authority of the New Motor Vehicle Board is interposed into plaintiffs' business affairs.

Specifically, plaintiffs' contention that the California Automobile Franchise Act deprives them of property without due process of law rests principally upon characterization of one step in the regulatory scheme as "issuance of an injunction." This characterization is misconceived. Defendants submit that when the challenged administrative step is properly identified and recognized for what it is, plaintiffs' motion for summary judgment upon this due process claim as a question of law alone must fail.

The challenged regulatory step which plaintiffs erroneously label "an injunction" is constituted by that action which California Vehicle Code section 3062 requires the New Motor Vehicle Board to take upon the filing of a protest against the franchisor's proposed establishment or relocation of a dealership. The action mandated by the language of that section is as follows:

> "When such a protest is filed, the Board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the Board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership." Cal.Veh. Code § 3062.

It is thus the Legislature, and not the Board, which has identified the necessity for delay pending further inquiry, and the circumstances under which that necessity is deemed to arise.

The Board action mandated by Section 3062 thus constitutes notification to the franchisor of the legislatively-determined necessity for delay attendant upon the Board's inquiry, and, as recited in the notifications made in this case (Complaint Exhibits D, E, H, K, and L), requires that the franchisor defer consummation of its proposed action until such time as the Board has inquired into the matter and resolved the issues of public interest articulated as good cause under Section 3063.

It is only after subsequent inquiry, constituted by notice and hearing upon the issues of good cause, that any order issues which can be fairly characterized as an "injunction." That order, constituted by the Board's written decision which is final upon announcement (Cal.Veh. Code § 3067), has injunctive effect against the proposed action only if the Board has determined that good cause exists for not permitting the franchisor's proposed action and acts within the time limits of Section 3067. In all other cases the franchisor's proposed action is deemed approved. *Id.*

C. *Even if it is Assumed, Arguendo, That Plaintiffs are Deprived of Substantial Interests by the Operation of the California Automobile Franchise Act, Plaintiffs are not Denied Due Process of Law by the Absence of a Statutory Requirement of a Hearing Prior to Initial Board Action.*

It has long been established, in treating of regulatory measures enacted in aid of the public interest, that when a hearing is required under administrative procedures:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding *so long as the requisite hearing is held before the final order becomes effective." Opp Cotton Mills v. Administrator of Wage & Hour Division,* 312 U.S. 126, 152 (1941). Emphasis supplied.

In *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950) reh.den. 340 U.S. 857, the Supreme Court

elaborated on the requirements of due process as they affect the timing of a hearing where administrative discretion, as opposed to ministerial adherence to the statutory requirement involved in the present case, was authorized. In addressing the discretion vested in an administrator to effectuate an outright seizure of property incident to commencement of judicial enforcement proceedings, the Court stated:

> "Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. *It is sufficient, where only property rights are concerned, that there is at some stage an opportunity and a judicial determination* [Citations omitted]" 399 U.S. at 599. Emphasis supplied.

In the case before the court, of course, the challenged statute provides for an adjudicatory hearing prior to any final action by the New Motor Vehicle Board. Moreover, no discretion is exercised by the administrative agency in effectuating the explicit command of the staute (sic).

In their attack upon the absence of a statutory provision of a hearing prior to administrative notification of the prohibition on consummation of plaintiffs' business relations defendants rely principally upon reference to *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969), *Boddie v. Connecticut,* 401 U.S. 371 (1971) and *Fuentes v. Shevin,* 407 U.S. 67 (1972), as requiring a hearing prior to deprivation of any significant property interest. These cases, however, are not inconsistent with the holdings in *Opp Cotton*

Mills, supra, and *Mytinger and Casselberry, supra.* In *Sniadach, supra,* the Court specifically observed:

> "We deal here with wages—a specialized type of property presenting distinct problems in our economic society." 395 U.S. at 340.

The Court then discussed the problems presented by the Wisconsin garnishment statute in light of the nature of that specialized type of property and, concluding, noted:

> "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall.[9]

[9] 'For a poor man—and whoever heard of the wages of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat . . .' Congressman Gonzales, 114 Cong.Rec. 1833 . . ."

395 U.S. at 342. Moreover, as was pointed out in the concurring opinion of Mr. Justice Harlan, no justification founded in the regulatory interest of the State was advanced in support of the Wisconsin statute.

Boddie, supra, involved no special species of property, but rather the institution of marriage and the right of access to the courts as the sole means available to effect its dissolution.

Fuentes v. Shevin, supra, involved facts more akin to the *Sniadach* case. In *Fuentes,* the Court confirmed the right to a hearing prior to seizure of household goods under judicial process. Invalidating the Florida and Pennsylvania replevin statutes under the Due Process Clause for failure to provide for such a hearing, the Court stated that it is an "important

interest," citing *Sniadach, supra,* 395 U.S. at 539, and not only a "necessary" one, which it held to be protected. 407 U.S. at 90. In *Fuentes,* as in *Sniadach,* the Court made it clear that it deemed the state statutes in question to serve no important governmental or general public interest and, pointing to *Ewing v. Mytinger and Casselberry, Inc., supra,* confirmed that when necessary to secure an important governmental or general public interst (sic), even outright seizure need not necessarily be preceded by a hearing. 407 U.S. at 90-92.

Sniadach and *Fuentes,* then, treat of the necessity of a hearing prior to deprivation when dealing with "important interests" of private persons in the absence of important governmental or general public interest. *Boddie* dealt with the right of a hearing *per se* in the case of persons forced to settle their claims through judicial process and confirmed that right, over the state's minimal interest in fees and costs. 401 U.S. at 382.

The law governing the present case would therefore be unadumbrated by the decisions alluded to by plaintiffs even if it were conceded—as defendants do not concede—that even a seizure of property were the result of the statute; for the police power of the state, having been interposed into the business of motor vehicle retail sales by the public interest as found by the legislature (Cal.Stats. 1973, ch. 996, § 1) results in no deprivation of any substantial interest of plaintiffs unless and until a final determination has been made, following a hearing, that

good cause therefor exists. At bottom, the cognizable interest of plaintiffs which is interfered with by those initial, pre-hearing actions of the Board under the statute, is the expectancy of continued conduct of their business relations unfettered by the regulatory hand of the State. That expectancy is one which plaintiffs simply have no right to entertain. *Williamson v. Lee Optical, supra,* 348 U.S. at 486-488.

D. *The Inconvenience to Plaintiffs Occasioned by Necessity of Compliance With the Terms of the California Automobile Franchise Act Does Not Work a Deprivation of Due Process.*

The injury claimed by plaintiffs as a result of operation of the California Automobile Franchise Act centers upon the economic hardship involved in being at present unable to commence sales of a specific linemake of new motor vehicles at their proposed locations. Obviously, the lost benefits of business which might have been transacted but for the necessity of compliance with regulatory requirements attends most, if not all, proposed ventures which are subject to state inquiry prior to commencement of business.

By way of example only, prior to establishment of a bank or trust company within the State, California has long required "careful investigation and examination" to be made by the Superintendent of Banks relative to specified factors concerning the character of the applicants and other specified factors concerning the community to be served by the institution proposed to be established, including competition offered by existing financial institutions and opportunities for

profitable employment of bank funds or fiduciary funds and opportunities for profitable employment of fiduciary services. Cal.Fin.Code § 361. The Superintendent is also authorized to consider "[s]uch other facts and circumstances bearing on the proposed bank or trust company and its relation to the locality as in the opinion of the superintendent may be relevant". Cal.Fin.Code § 361(f). The Superintendent is further required to withhold approval until seven specified evaluative criteria have, to his satisfaction, been met. Cal.Fin.Code § 361.

Similar investigative requirements obtain in regulation of the savings and loan industry by the Savings and Loan Commissioner, who is required to consider "all facts connected with the formation of the proposed association" and "whether the public convenience and advantage will be promoted by the formation of such association". Cal.Fin.Code § 5509.

In the case of both proposed banks and trust companies, the investigative inquiry mandated by the relevant statute pre-supposes a substantial modicum of preparatory effort by the initiator of the proposed enterprise. Assemblage of proposed officers, directors and stockholders of the bank or trust company is a functional prerequisite of an application to the Superintendent of Banks for authority to engage in banking. See Cal.Fin.Code § 361 subdivisions (a), (d), (e). The Savings and Loan Commissioner must similarly receive the articles of incorporation and by-laws of the proposed association prior to initiating his examination and investigation under California Finance

Code section 5509. The Commissioner is additionally required to hold a hearing upon the application unless mandatory grounds for refusal exist, and must give written notice of the hearing to each association existing in the State. Cal.Fin.Code § 5510. At the hearing any person may appear and show cause why the application should not be granted. Cal.Fin.Code § 5511.

Numerous provisions requiring deferral of realization of proposed actions pending administrative inquiry necessitated by the public interest, govern a variety of commercial undertakings. Again, by way of example only, comparable inquiry and comparable delay may be discerned pending hearings upon and inquiry into public interest considerations, by the Department of Transportation attendant on applications for permits to operate an airport at a particular site under Article 3, chapter 4, division 9 of the California Public Utilities Code (Cal.Pub.U.Code §§ 21661 *et seq*); by voluntary health area planning agencies incident to review of individual applications for proposed construction of new or additional hospitals. under Part 1.5, division 1 of the California Health and Safety Code (Cal.H & S Code §§ 437 *et seq.*); and by the Department of Alcoholic Beverage Control upon protests filed against applications for issuance of a license to engage in the sale of alcoholic beverages at a given location, under Articles 3 and 4, chapter 6, division 9 of the California Business and Professions Code (commencing with Cal.B & P Code § 23985).

The foregoing regulatory provisions for administrative inquiry into proposed action contemplate varying but substantial amounts of preparatory effort prior to initiation of administrative procedures. See Cal.Pub.U.Code §§ 21661.5, 21661.6, 21664 (airport construction or expansion); Cal. Health & Safety Code § 437.9 (hospital and related health facility construction and conversion); Cal. Bus. & Prof. Code §§ 23951-23953 (sale of alcoholic beverages).

The challenged provision is a component of a regulatory scheme which, like the foregoing statutory provisions, conditions the conduct of business upon satisfaction of legislatively-designated conditions. But unlike the necessary operation of the foregoing statutory provisions, no fixed modicum of preparatory effort or expenditure of resources by those regulated necessarily attends compliance with the franchisee notification provisions of the California Automobile Franchise Act. This is so because under the Act it is the franchisor, and the franchisor alone, which determines when it will makes its proposed action known to the New Motor Vehicle Board and existing line-make franchisees within the relevant market area. Cal.Veh.Code § 3062. Hence, insofar as the degree of injury allegedly suffered by plaintiffs is asserted in support of the substantiality of rights impaired (see Affidavit of Richard L. Fox 4:8-5:10; Affidavit of John Muller 10:19-11:22), the following facts are relevant and illuminative.

With respect to the proposed enfranchisment of plaintiff Fox, General Motors Corporation received

Mr. Richard L. Fox's "Application for Buick Selling Agreement" on July 15, 1974. Exhibit 18, Deposition of S. G. Gilliatt, Transcript 46:1-10. The only prospective location which Mr. Fox ever discussed and considered with General Motors' Buick Motor Division in connection with his application was his existing sales facility at 3456 Colorado Boulevard. Deposition of Richard L. Fox, Transcript 22:6-23:10. Yet it was not until April 1, 1975, that Buick first communicated with Mr. Fox concerning compliance with the notification provisions of the Act, which had been in effect since July 1, 1974. Exhibit 22, Deposition of S. G. Gilliatt, Transcript 45:4-19; Exhibit B, Deposition of Richard L. Fox, Transcript 10:28-11:4. On April 7, 1975, Mr. Fox responded to Buick's communication and advised Buick, in relevant part, as follows:

> "This is to advise that the Orrin W. Fox Co. has determined that it is our desire to accept the appointment without giving notice to existing Buick dealers located within a 10-mile radius of 3456 E. Colorado Boulevard.
>
> "We recognize the risk potential insofar as the California Dealer Relations Statute (AB-225, as amended) and are willing to accept those risks."

Exhibit C, Deposition of Richard L. Fox, Transcript 12:24-14:18. Plaintiff Fox was thereupon finally franchised by Buick as a Buick-Opel dealer effective May 2, 1975, without notice to existing franchises in the relevant market area. Affidavit of Richard L. Fox 2:1-5.

With respect to the relocation of plaintiff Muller's franchise, it was understood between plaintiff General Motors Corporation's Chevrolet Motor Division and Muller's predecessor in interest as early as October 1, 1973, that a relocation was a distinct possibility. Exhibit 15, Deposition of S. G. Gilliatt, Transcript 45:4-19. See Affidavit of John Muller 7:25-8:6. On July 1, 1974, the Automobile Franchise Act became effective. Following the effective date of the Act, Mr. Muller notified Chevrolet that plaintiff Muller intended to lease with option to buy, property located at 475 Foothill Boulevard in LaCanada. Exhibit C, Deposition of John A. Muller, Transcript 65:28-67:9. Though negotiations to occupy that location were not consummated on that occasion, Chevrolet viewed the location and expressed at least tentative approval. Deposition of John A. Muller 67:18-68:3. Pursuant to an agreement reached in September, 1975, however, the same location was secured in November of 1975. Exhibit B, Deposition of John A. Muller, Transcript 34:2-10. Again, Chevrolet expressed tentative approval. Muller Deposition, Transcript 34:11-35:18. Nevertheless, it was not until the very date of Chevrolet's final approval of plaintiff Muller's relocation that notice pursuant to California Vehicle Code section 3062 was given to the New Motor Vehicle Board and existing line-make franchisees. Exhibit 10, Deposition of S. G. Gilliatt, Transcript 45:4-19.

Thus, in the case of Fox, the subject of compliance with the notice provisions of the Act were not even addressed among the plaintiffs until the eve of Fox's

enfranchisement by Buick, and at the agreement of the plaintiffs Fox and General Motors, notice was not given by Buick under the provisions of Vehicle Code section 3062. In the case of Muller, General Motors through its Chevrolet Division gave notice of plaintiff Muller's relocation only on the very day of its final approval of that action, even though it had been the intention of Muller and Chevrolet to relocate the former's franchise to the Foothill Boulevard location for at least several months prior to that date.

The conclusion is therefore unavoidable that delay attending the necessity of notification is not a defect of the Act or the fault of defendants, but rather the result of the delay of plaintiff General Motors Corporation—whether calculated or not—in initiating compliance with the Automobile Franchise Act's provisions, for, as earlier observed, it is the franchisor and the franchisor alone which determines when its intended action will be the subject of notification under the statute.

Moreover, as is reflected in the Affidavit of Sam W. Jennings, filed herewith, such delays as have occurred subsequent to the filing of protests against the proposed actions involved in this case have not been occasioned by the defendant New Motor Vehicle Board, but have rather been the result of acts of General Motors, through its respective divisions, and of the other parties to the protest proceedings involved. In point of fact, in the case of plaintiff Fox's enfranchisement, at the time of the filing of two

protests against that action, Buick had still not provided notice to either protestant under California Vehicle Code section 3062. In that case, Buick provided no such notification until July 24, 1975, some two months after the protests were filed and approximately two weeks after the New Motor Vehicle Board had set the protests for hearing.

In the case of Muller Chevrolet, following the filing of protests, the Board on February 6, 1976, notified Chevrolet Motor Division of the requirement of California Vehicle Code section 3062 that Chevrolet not effect its proposed relocation pending hearings. On February 20, 1975, Chevrolet through its attorneys requested a 5-day hearing, whereupon the Board, three days later on February 26, 1976, tentatively assigned hearing dates of June 21 through 25, 1976 in accordance with Chevrolet's request, and such were the scheduled hearing dates as of April 13, 1976, the date the present action was filed by plaintiffs.

Neither the delay alleged by plaintiffs incident to the notification requirement of California Vehicle Code section 3062 nor the delay alleged in connection with the present protests involving plaintiffs can be deemed attributable to the New Motor Vehicle Board or any defect in the California Automobile Franchise Act. Plaintiffs have not been denied due process of law by reason of the absence of a statutory requirement for a hearing either prior to or in close temporal proximity to the commencement of administrative action by the New Motor Vehicle Board.

Conclusion

For the foregoing reasons it is respectfully submitted that plaintiffs' motion for partial summary judgment must be denied.

Dated: August 5, 1976.

Respectfully submitted,
Evelle J. Younger
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/s/ Robert L. Mukai
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APPENDIX

CALIFORNIA AUTOMOBILE FRANCHISE ACT

(California Vehicle Code §§ 3060-3069)

Article 4. Hearings on Franchise, Modification, Replacement, Termination, Refusal to Continue, Delivery and Preparation Obligations, and Warranty Reimbursement

(Added Ch. 996, Stats. 1973. Operative July 1, 1974)

(Amended Ch. 384, Stats. 1974. Operative July 5, 1975)

Termination of Franchise

3060. Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good

cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974 by terms of an urgency clause.

Good Cause

3061. In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably

provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Establishing or Relocating Dealerships

3062. In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership *within or into* ( )[1] a relevant market area where the same line-make is then represented, the franchisor shall in writing first notify the board and each franchisee in such line-make in the relevant market area of *his* intention to establish ( )[2] an additional dealership *or to relocate an existing dealership within or into* ( )[3] that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any *such* franchisee ( )[4] may file with the board a protest to the establishing or relocating of the ( )[5] dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed

dealership until the board has *held a hearing as provided in Section 3066, nor thereafter, if the board has* determined that there is good cause for not permitting such ( )[6] dealership. In the event of multiple protests, hearings *may* ( )[7] be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974, by terms of an urgency clause.

Amended Ch. 653, Stats. 1975. Effective January 1, 1976.

The 1975 amendment added the italicized material and at the point(s) indicated deleted the following:

[1]"in"
[2]"or relocate"
[3]"in"
[4]"receiving such notice"
[5]"proposed additional"
[6]"additional"
[7]"shall"

Good Cause

3063. In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Permanency of the investment.

(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(3) Whether it is injurious to the public welfare for an additional franchise to be established.

(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Delivery and Preparation Obligations

3064. (a) Every franchisor shall specify to its franchisees the delivery and preparation obligations of such franchisees prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations, which shall constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but which shall not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with such delivery and preparation obligations shall be filed with the board by franchisors, and shall constitute the compensation as set forth on such schedule. The schedule of compensation shall be reasonable, with the reasonableness thereof being subject to the approval of the board, providing a franchisee files a notice of protest with the board. In determining the reasonableness of the schedules, the board shall consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate.

(b) Upon delivery of the vehicle, the franchisee shall give a copy of the delivery and preparation obligations to the purchaser and a written certification that he has fulfilled these obligations.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Warranty Reimbursement

3065. (a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill such warranty when the franchisee has fulfilled warranty obligations of repair and servicing and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation.

The reasonableness thereof shall be subject to the determination of the board; provided that a franchisee files a notice of protest with the board.

(b) In determining the adequacy and fairness of such compensation, the franchisee's effective labor rate charged to its various retail customers may be considered together with other revelant criteria.

(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that such part, in fact, is not defective, the franchisor shall return such part so alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d) All such claims made by franchisees hereinunder shall be either approved or disapproved within 30 days after their receipt by the franchisor. When any such claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within such period, and each notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this section and Section 3064 for such labor and parts shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Hearings on Protests

3066. (a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer, designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515 and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicles dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974, by terms of an urgency clause.

Decision

3067. The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974, by terms of an urgency clause.

Judicial Review

3068. Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date

on which the final order of the board is made public and is delivered to the parties personally or is sent them by registered mail.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

Amended Ch. 384, Stats. 1974. Operative July 5, 1974, by terms of an urgency clause.

Application of Article

3069. The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises.

Added Ch. 996, Stats. 1973. Operative July 1, 1974.

United States District Court
Central District of California

No. 76 1200 WPG

[Title omitted in printing]

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Introduction

Upon careful review of the arguments advanced by plaintiffs in opposition to defendants' motion to dismiss, defendants deem extended reply unnecessary for resolution of the motion, which has already been argued at some length in defendants' original points and authorities submitted in support thereof. Defendants therefore take this opportunity only to invite the Court's attention to one recent decision of the United States Supreme Court, announced subsequent to the filing of plaintiffs' opposition herein, which defendants submit is relevant to this Court's consideration of the motion to dismiss under the doctrine of abstention.

Argument

THE DOCTRINE OF ABSTENTION IS NEITHER SO NARROW NOR SO EXTRAORDINARY AS TO PRECLUDE ITS APPLICATION TO THE PRESENT CASE

In *Bellotti v. Baird, et al,* and *Hunerwadel v. Baird, et al.,* Nos. 75-73 and 75-109, 44 L.W. 5221, (announced July 1, 1976), the Supreme Court reiterated the appropriateness of abstention in those cases where a state court interpretation of a state statute has not been afforded, when such interpretation would either avoid or substantially modify the constitutional challenge to the statute.

In the *Baird* case the Court considered the doctrine of abstention in the context of a challenge to a Massachusetts statute which it was claimed, created a "parental veto" over performance of abortions on minor children. Plaintiffs alleged, and the District Court held, that the statute violated the Equal Protection and Due Process clauses of the Fourteenth Amendment.

In holding that the District Court should have abstained from deciding the constitutional issue pending construction of the statute by the Massachusetts court, the Court pointed out that substantial variance existed between possible interpretations of the statute in its operation and that the statute, under interpretations other than that adopted by the District Court, would be "fundamentally different" from one having the effect ascribed to it by the three-judge federal forum. The Court stated:

> "In deciding this case, we need go no further than the claim that the District Court should have abstained pending construction of the statute by the Massachusetts courts. As we have held on numerous occasions, abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the neces-

sity for federal constitutional adjudication, or at least materially change the nature of the problem.' *Harrison v. NAACP,* 360 U.S. 167, 177 (1959). See also *Colorado River Conservation District v. United States,* ..... U.S. ..... (slip op. 12-13) (1976); *Carey v. Sugar,* ..... U.S. ..... (slip op. 6) (1976); *Kusper v. Pontikes,* 414 U.S. 51, 54-55 (1973); *Lake Carriers' Assn. v. MacMullan,* 406 U.S. at 510-511 (1972); *Zwickler v. Koota,* 389 U.S. 241, 249 (1967); *Railroad Comm'n v. Pullman Co., supra.*" 44 L.W. at 5225.

In confirming the applicability of the language of *Harrison v. NAACP,* 360 U.S. 167, 177 (1959) to the case before it, the Court stated: ". . . [W]e think it clear that in the instant case adoption of appellants' interpretation would 'at least materially change the nature of the problem' that appellants claim is presented. *Harrison v. NAACP,* 360 U.S. at 177." 44 L.W. at 5225.

In addressing the necessity of abstention in such a case the Court specifically observed:

> "It is sufficient that the statute is susceptible to the interpretation offered by appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would. Indeed, in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented." 44 L.W. at 5226.

In consideration of the foregoing, for the reasons set forth in defendants' original points and authori-

ties in support of the motion to dismiss, and upon examination by the Court of the arguments filed by the parties in respect of plaintiffs' motion for partial summary judgment, the appropriateness of abstention in the present case should be manifest.

Conclusion

It is respectfully submitted that defendants motion to dismiss the action herein should be granted.

Dated: August 5, 1976.

Respectfully submitted,
Evelle J. Younger
Attorney General
/s/ Robert L. Mukai
Robert L. Mukai
Deputy Attorney General

Attorneys for Defendant New Motor Vehicle Board, Jacaban, Jones, Barnes, Onesian, Tuttle, Vandenberg and Jennings

United States District Court
Central District of California

No. 76 1200 WPG

[Title omitted in printing]

NOTICE OF JOINDER OF DEFENDANT DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS AS DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES IN MOTION OF DEFENDANT NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Department of Motor Vehicles of the State of California and Herman Sillas, sued herein as the Director thereof, hereby join in the motion of Defendant New Motor Vehicle Board of the State of California to dismiss the within action and in the Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment heretofore filed by said defendant New Motor Vehicle Board of the State of California.

Dated: Aug. 13, 1976

Evelle J. Younger
Attorney General

/s/ Stephen J. Egan
Stephen J. Egan
Deputy Attorney General
Attorneys for Defendants
Department of Motor Vehicles
and Herman Sillas, as Director
of the Department of Motor
Vehicles

(Service information omitted in printing)

United States District Court
Central District of California

No. CV 76 1200 WPG

[Title omitted in printing]

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Preliminary Statement

On June 7, 1976, plaintiffs moved this Court for a summary determination that the California Automobile Franchise Act ("Act"), violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because it deprives plaintiffs of liberty and property without prior notice and the opportunity to be heard; and, that the Act is invalid under the Supremacy Clause of the United States Constitution because it directly conflicts with the antitrust laws of the United States.

On August 5, 1976 defendant New Motor Vehicle Board ("Board") and the Members and Executive Secretary thereof, filed a Memorandum in Opposition to the Motion for Partial Summary Judgment. In that document, defendants have expended a great deal of effort to raise and argue a plethora of matters that are irrelevant to the narrow legal issues presented by the motion for partial summary judgment.

In view of defendants' lengthy detour into irrelevancy, it is necessary again to delimit the issues which are presented by the Motion and cull out those matters that are neither raised by nor relevant to the Motion.

II. The Issues Presented

Plaintiffs' two claims are both directed at the same specific portion of the Act: namely, that portion which allows an existing franchised automobile dealer to obtain a prehearing injunction of indefinite duration prohibiting the establishment or relocation of a competitive dealership within a 10-mile radius by doing no more than sending a simple letter of protest to the California New Motor Vehicle Board ("Board"). Plaintiffs' Motion is limited in scope, and deals only with the establishment and relocation provisions of the Act, the nucleus of which is California Vehicle Code § 3062; it is in this context only that plaintiffs have moved for a determination that the automatic injunction procedure violates the basic requirements of due process and operates in a manner contrary to the mandate of the Sherman Act.

Despite defendants' suggestions to the contrary, the following issues are *not* presented by the motion for partial summary judgment.

A. *There Is No Due Process Challenge to the Basic Regulatory Powers of the State*

Defendants suggest that plaintiffs' due process challenge to the Act constitutes an objection to the

principle of state regulation of the automobile industry itself. (Defendants' Memo. pp. 43-44). The suggestion is erroneous.

Plaintiffs' Motion does not challenge the authority of the State to effect *some* regulation of business. What plaintiffs do contend is that *when* the State undertakes to regulate, the imposition of its power must comport with the root requirements of constitutional due process.*

B. *The Present Motion Does Not Challenge Those Portions of the Act Which Deal With Modification, Termination, Warranty and Dealer Preparation Obligations*

Defendants' extensive exposition of the Act (Defendants' Memo. pp. 9-15) treats a number of provisions dealing with modification or termination of franchises, dealer preparation obligations and the implementation of warranties.

The validity of these provisions is not here at issue. Plaintiffs' challenge deals only with that part of the Act controlling the establishment and relocation of dealerships, the touchstone of which is Section 3062.**

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*Accordingly, that portion of defendants brief and the two affidavits that deal with the necessity and propriety of state regulation are irrelevant to the issues now before the Court. (Defendants' Memo. pp. 5-8; Affidavits of Fred J. Lema and Robert W. Burgett in Opposition to Motion for Summary Judgment.)

**To the extent this Court may be concerned with the preservation of the termination, dealer preparation and warranty provisions, plaintiffs would invite the Court's attention to the "saving clause" set forth in Vehicle Code § 5.

C. *The Scenario Prior to the Filing of a Protest and the Events Leading to a Decision by the Board After a Hearing Are Not At Issue*

Defendants have devoted a significant portion of their brief regarding the due process issue to a synopsis of selected facts concerning the steps taken by the Orrin W. Fox Co. ("Fox"), Muller Chevrolet ("Muller") and General Motors Corporation ("General Motors") prior to General Motors' advising the Board and surrounding dealers of the proposed enfranchisement and relocation (Defendants' Memo. pp. 52-55); the manner in which the Board goes about making a decision *after* a hearing (pp. 12-15); and the propriety of a Board determination on the merits of a protest (Defendants' Memo. pp. 44-46). Defendants, having introduced these factual issues, erroneously assert that there is a need for more of the same. (Defendants' Memo. pp. 3-4, lines 17-3; 28-31).

Defendants' synopsis of the communications between Fox and General Motors concerning the enfranchisement of Fox and of the communications between Muller and General Motors concerning the proposed relocation, is totally irrelevant to the due process issue before the Court. The validity of Board determinations after a hearing are similarly extraneous. The only question presented under the Due Process Clause is whether the Constitution guarantees Fox, Muller and General Motors the right to notice and to some form of impartial hearing *before* the Board issues its prohibitory order.

D. *There is No Dispute About the Only Facts Which Are Necessary to a Determination of Plaintiffs' Motion*

The pivotal facts which are material to determining the issues raised by the present Motion and the propriety of summary judgment are set forth in plaintiffs' affidavits and are, in essence, as follows:

(1) Muller is an existing franchisee of the Chevrolet Motor Division of General Motors, and has been licensed as a motor vehicle dealer by the State of California;

(2) Operation of his dealership is the primary means whereby John Muller earns his livelihood;

(3) Fox is an existing franchisee of the GMC Truck and Coach Division of General Motors and of American Motors Corporation, and has been licensed as a motor vehicle dealer by the State of California;

(4) Operation of his dealership is the primary means whereby Richard Fox earns his livelihood;

(5) Pursuant to Vehicle Code § 3062, General Motors gave notice of its intention to approve the proposed relocation of Muller and of its intention to grant a Buick franchise to Fox;

(6) Two competitive Chevrolet dealers within the 10-mile statutory "relevant market area" of Muller's proposed relocation filed protests against that relocation, and two competitive Buick dealers who would also be competitors of Fox in the event Fox were allowed to sell and service Buicks, filed protests against that proposed enfranchisement;

(7) Upon receipt of those "protest letters" and as a routine matter of "ministerial adherence to the statutory requirement . . ." of Vehicle Code § 3062 (Defendants' Memo. p. 46, line 27) the Board issued orders prohibiting General Motors, Muller and Fox from going forward with the proposed actions; and

(8) The Board's prohibitory orders, backed up by the full panoply of the civil and criminal enforcement powers of the Department of Motor Vehicles, was summarily issued without notice or hearing of any kind and without any substantive scrutiny, review or consideration by any impartial governmental official.

Since defendants have either acknowledged or have failed to contravene by affidavit any of these fundamental facts, such facts must be deemed admitted by defendants pursuant to Rule 3(g)(3) of the Local Rules of the Central District. Hence, there can be no genuine dispute as to the crucial facts and plaintiffs' Motion must be determined as a matter of constitutional law on those facts.

Wtih these facts established, it is apparent that relief is needed here in order to protect the rights of plaintiffs to due process. The constitutional dimensions of the right to engage in lawful business have

been identified and examined by the Supreme Court in a series of decisions spanning the nearly half century between *Meyer v. Nebraska,* 262 U.S. 390 (1923) and *Goldberg v. Kelly,* 397 U.S. 254, 262 (n. 8) (1970). The right to notice and a hearing prior to suffering the deprivation of this, or any other substantial interest, has been repeatedly discussed by the United States Supreme Court in recent years. See, *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

E. *The Antitrust Consequences of a Board Determination on the Merits Are Not at Issue*

The question presented by the present motion concerns the anticompetitive effect of the absolute bar on establishment or relocation which is obtained, simply for the asking, by competitive dealers *prior* to notice and the opportunity to be heard. The question of what antitrust consequences may flow from the Board's deciding to sustain the protest and make the prohibition permanent, *after* notice and hearing, is not now before this Court. However, among the arguments presented by defendants in support of their position that the Act is not inconsistent with the federal antitrust laws, is an extensive discussion of how the Board, in considering and resolving protests, once notice and hearing is finally given, operates in a different manner than did the defendants whose activities were deemed to violate the Sherman

Act in *American Motor Inns v. Holiday Inns, Inc.,* 521 F.2d 1230 (3d Cir. 1975). (Defendants' Memo. pp. 20-27). This argument simply misses the mark.

The issue plaintiffs respectfully request this Court to resolve is whether the national economic policy reflected in the federal antitrust laws and made paramount by the Supremacy Clause, prevents the State from placing into the hands of private parties the power to bar the establishment or relocation of a competitor by obtaining, as a ministerial matter and prior to any notice or hearing, a Section 3062 injunction. It is this prehearing "veto" that demands invalidation under the Supremacy Clause.

Overall, then, it is clear that while defendants have expended considerable effort in explicating and arguing a number of facts and "issues" which might be pertinent to some other lawsuit, those issues are totally irrelevant to the questions raised by the present motion. The instant Motion turns solely on an application of constitutional laws to undisputed facts and should not be avoided by allusion to extraneous, irrelevant facts and false issues.

III. DUE PROCESS REQUIRES NOTICE AND THE OPPORTUNITY TO BE HEARD

A. *The Board's Prohibitory Injunction, Irrespective of the Label Used to Describe It, Cannot Constitutionally Issue Without Notice and the Opportunity to Be Heard*

In support of their contention that the Board's prohibitory order is not unconstitutional, defendants

advance the proposition that because the Act commands the Board automatically to issue its order without the exercise of any discretion, it has been "erroneously label(ed)" as an "injunction" when in fact said order is no more than a letter of "notification." (See Defendants' Memo. pp. 44-45.) Thus, defendants conclude, when this order is "recognized for what it is," plaintiffs' Motion must fail as a matter of law (Defendants' Memo. p. 44, lines 21-25).*

How an argument stressing the automatic and mindless nature of the prohibition commanded by the statute constitutes a defense to the due process issue now before the Court is mystifying. Plaintiffs are not challenging a discretionary act or a peculiar application of the Board's injunctive order in any particular case, but rather the statute itself which mandates that such an order issue absent review, notice or hearing in *every* case where a request is made by a protesting dealer.

Indeed, the automatic nature of the injunction required by Vehicle Code § 3062, rather than constituting a defense, is the most egregious constitutional

*The Board's letter of prohibition, a representative example of which is attached as Exhibit "D" to plaintiffs' Complaint herein, speaks for itself. The first two sentences of that letter state:

> "You are hereby notified that Becherer Buick, Inc., 840 West Huntington Drive, Monrovia, California, filed a protest with the New Motor Vehicle Board under the provisions of Section 3062 State of California Vehicle Code. *Accordingly, you are advised you may not establish or relocate the proposed dealership until the Board has held a hearing* as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership." (Emphasis added.)

It is respectfully submitted that the Court, upon reading this letter, can readily recognize it "for what it is."

defect of the Act. It is this provision which delivers the full force and majesty of the State into the hands of private automobile dealers located in a statutory 10-mile "relevant market area." It is Section 3062 that creates the evil of a prohibitory order being issued not because the State upon notice and hearing has made an independent and unbiased determination that the intrusion of its power is necessary under the particular circumstances of a given case, but because a private citizen writes a letter stating "I protest."

There can be no doubt that such a scheme violates the fundamental principles of due process in the exact same manner as the statutes struck down in *Fuentes v. Shevin, supra.* The comparison between the challenged provisions of the Act and the replevin procedures held to be constitutionally defective in *Fuentes* is striking and inescapable.

In *Fuentes*, the Court described the Florida replevin statute thusly:

> "Under the Florida statute . . . [t]here is no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, 'wrongfully detained.' Rather, Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession and reciting in conclusory fashion that he is 'lawfully entitled to the possession' of the property, and that he file a security bond . . . On the basis of the complaint and bond, a writ is issued 'command[ing] the officer to whom it

> may be directed to replevy the goods and chattels in possession of defendant . . . and to summon the defendant to answer the complaint.' . . . Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. *After* the property has been seized, he will eventually have an opportunity for a hearing. . . ." 407 U.S. 67 at 73-75 (1971) (Emphasis by the Court).

The Court observed that while the Pennsylvania statute was not materially different, it did not even require that the plaintiff formally allege that he was lawfully entitled to the property to be seized. *Id.* at 77-78. Thus, to the extent any differences may be perceived in the procedures struck down in *Fuentes* and the procedures in the Act, these are differences which make the present attack on the Act even more compelling. This is so because the statutes in *Fuentes* at least required a bond, and, in the case of the Florida statute, a statement under oath and a formal complaint before the deprivation could take place. None of these "safeguards" can be found in the instant case.*

Plaintiffs do not contend that the Constitution mandates a full evidentiary hearing prior to the de-

*Even if such "safeguards" were present in this case, the Act would still be unconstitutional: ". . . [T]hose requirements are hardly a substitute for a prior hearing for they test no more than the strength of the applicant's belief in his own rights." *Fuentes v. Shevin, supra* at 83.

privation.* The elasticity of due process cannot, however, except in the most extraordinary of circumstances, be stretched so far as to permit a deprivation without any hearing at all:

> ". . . [T]he Court has traditionally insisted that, *whatever its form*, opportunity for that hearing must be provided *before* the deprivation at issue takes effect." *Fuentes v. Shevin, supra* at 82. (Emphasis added.)

See also *Bell v. Burson*, 402 U.S. 535, 542 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1970); *Goldberg v. Kelly, supra;* and *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965).

On pages 47 to 49 of their Memorandum in Opposition, defendants suggest that, even if the Act results in deprivation of a substantial interest, the requirement of prior notice and a hearing as set forth in *Sniadach v. Family Finance Corp., Boddie v. Connecticut,* and *Fuentes v. Shevin, supra,* is not applicable herein. Two reasons are advanced in support of this proposition:

First, defendants suggest that the principles enunciated in *Sniadach, Boddie* and *Fuentes, supra,* deal only with deprivations of specialized types of property such as wages and household goods, and are therefore inapposite to the present case. (Defendants' Memo. pp. 42-49); and

*The concept of due process is sufficiently flexible to permit variance in the *form* of a hearing. *See, Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

Second, defendants claim that because there is no permanent deprivation unless and until the Board finally determines against the proposed enfranchisement or relocation of a dealer, due process is satisfied so long as there is a hearing before the Board's final order becomes effective. (Defendants' Memo. p. 49).

Defendants' first argument was likewise made in *Fuentes* and was categorically rejected by the Supreme Court: "In none of these cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests." *Fuentes v. Shevin, supra* at 89. See also *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1970) (right not to have reputation impaired). In addition, it is undisputed that the primary means whereby Messrs. Fox and Muller (as well as their employees) earn their respective livelihoods is through the operation of their dealerships. As to these individuals, the rights at stake are (although the monetary impact is greater) indeed synonymous with the wages deemed to be important interests in *Sniadach, supra* at 340, not to mention the kitchen stove and household goods involved in *Fuentes, supra* at 70-71. Similarly, General Motors and its thousands of employees are directly affected by the deprivation.

Moreover, the right to engage in a lawful business has long been afforded the same constitutional protection granted other fundamental rights. See, *Meyer v. Nebraska*, 262 U.S. 390 (1923). Defendants' attempt to avoid this protective penumbra by suggesting that the threatened interest, because it involves a business, is a "property" right which is somehow different than other constitutionally protected liberties. To the extent that defendants cite and quote *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) (Defendants' Memo. p. 47, lines 1-9) in support of this particular proposition, they are relying on a distinction that the Supreme Court has expressly rejected:

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

Defendants' second argument to the effect that due process is forgiving of temporary deprivations so long as there is a hearing prior to a permanent deprivation finds no support in the case law.* Indeed,

*On page 45 of their Memorandum, defendants raise the same temporal distinction to support the contention that the Board's initial prohibition is not really an "injunction" because it is not a permanent order. This argument overlooks the fact that injunctions may be either preliminary or permanent in nature and that, in either case, due process requires notice and a hearing before issuance of the order.

the Supreme Court, in *Fuentes v. Shevin, supra* at 86, has expressly rejected this notion:

> "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. *While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing,* it is not decisive of the basic right to a prior hearing of some kind.*"

It made no difference to the Court in *Fuentes* that a later hearing might vindicate the rights of the deprived party or that the required bond (absent in this case) might provide a vehicle for money damages:

> "But no later hearing and no damage award can undo the fact that the arbitrary taking that

*While the duration of the Board's injunction is irrelevant to the constitutional issue presented herein, it is interesting to note defendants' attempt to minimize the initial prohibition by characterizing it as a mere delay or inconvenience (Defendants Memo. p. 45, line 12; p. 50, line 1). Despite this characterization, it is clear that the Board's prohibition may remain in effect for a considerable period and while in effect has a dramatic impact upon the parties who are affected by the prohibition.

Pursuant to the Board's regulations, and as described in defendants' Memorandum (page 12, lines 19-26), *at some time* "subsequent to issuance" of the prohibition on establishment or relocation, the Board must order a hearing to be held. Although the hearing date must be within sixty days of the date the Board sends the order for a hearing, the missing ingredient is the time elapsed between the initial injunction and the "subsequent" order setting a hearing date. Moreover, where the matter is heard by a hearing officer, even if the franchisor prevails and the hearing officer finds the protest devoid of merit, the injunction remains in effect until such time as the Board finally acts. *Throughout this entire period— and even if the hearing officer finds a particular protest totally devoid of merit—the injunction remains in effect.*

> was subject to procedural due process has already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Id.* at 82, quoting *Stanley v. Illinois*, 405 U.S. 645, 647.

Defendants' reliance on *Opp Cotton Mills v. Administrator of Wage & Hour Division*, 312 U.S. 126, 152 (1941), for the purpose of distinguishing hearing requirements with respect to temporary and final orders is misplaced. The due process question in that case arose out of proceedings by an industry committee formed by the Administrator of the Wage and Hour Division of the Labor Department to investigate industry conditions and to make recommendations to the Administrator with respect to minimum wages. After conducting an investigation and considering the information gathered, the committee made its recommendations to the Administrator; that official thereupon gave notice, conducted hearings, made findings and issued a final order. Not until this final order was made was there any effect on petitioner's business.

Petitioner Opp Cotton Mills challenged the Administrator's order on the grounds that the investigating committee did not conduct a formal proceeding upon notice and a hearing. In rejecting this challenge, the Supreme Court drew a careful distinction between the due process requirements imposed on a committee which could only *recommend* action and the administrative agency which had the power to *take* action.

> "It is clear that the sections of the statute now before us do not require the committee to conduct a quasi-judicial proceeding upon notice and hearing. *Its function, as already stated, is to investigate upon the basis of data which the Administrator may submit and which the committee may procure for itself and to report its recommendation with respect to the minimum wage.*" 312 U.S. 126, 152. (Emphasis added.)

In that same paragraph, and again on the next page of its opinion, the Court pointed out that before anyone could be actually affected by administrative action, it was necessary to satisfy a far more stringent standard of due process. Thus, a minimum wage rate could not be put into effect ". . . by administrative action which has not been found to be in accordance with law by an independent, responsible administrative office of the Government, exercising an independent judgment on the evidence *after a legal hearing.*" 312 U.S. 152 (Emphasis added).

The Court went on to note that there had indeed been notice and a hearing prior to implementation of the wage order:

> "Notice of the hearing before the Administrator was given in conformity to the statute, and since the notice was forty days in advance of the time when petitioner's representative was heard and introduced evidence into the record and a further opportunity was given to present evidence, the contention that the notice to petitioner was inadequate or failed to meet constitutional requirements is without merit." *Id.* at 153.

Thus, it can be seen that, on the facts of *Opp Cotton Mills*, notice and a hearing were provided *prior* to the time petitioners were actually affected.

Although defendants cite *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950) *reh. denied*, 340 U.S. 857, to support the notion that due process is satisfied by a hearing at "some stage" (Defendants' Memo, p. 47, line 6), the careful procedures followed by the government in that case stand in stark contrast to the procedures under the Act. Moreover, as has been noted in plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment (pp. 22-25), *Ewing* is totally inapposite because it represents the kind of extraordinary situation (misbranded drugs) which *Sniadach, supra* held may permit summary seizure. Despite the extraordinary nature of the circumstances, the procedures followed in *Ewing*, unlike the Act, at least required two levels of independent governmental scrutiny prior to effecting the deprivation. The first such level of scrutiny was by the Food & Drug Administrator who made an independent finding of probable cause to justify the seizure. That finding was then subject to review by the Attorney General of the United States. Under the Automobile Franchise Act, there is no requirement for a finding of good cause and the deprivation occurs absent any review or approval by any responsible government official.

B. *There Are No "Extraordinary Circumstances" Present in Establishment or Relocation Cases Sufficient to Justify Deprivation Prior to Notice and Hearing*

As the decisions discussed above repeatedly emphasize, any exemption from the notice and hearing requirement of the Due Process Clause is, and must continue to be, closely confined. Pre-hearing deprivations, whatever their duration, must arise in the context of "*extraordinary situations* where some valid governmental interest [is] at stake that justifies postponing the hearing until after the event," *Boddie v. Connecticut, supra* at 379. (Emphasis added.) The test for these "extraordinary situations" and the procedures that must be followed were enunciated by the Supreme Court in *Fuentes,* supra, at 91:

> "First, in each case [where seizure was permitted] the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."

There can be no doubt that the establishment and relocation provisions of the Act are in blatant violation of the requirement that the State maintain strict control over its monopoly of legitimate force by assuring that the person initiating the deprivation is a

government official responsible for determining what is necessary and justified in the particular instance. The Automobile Franchise Act, as is repeatedly revealed in defendants' own Memorandum, freely delivers the monopoly of force into the hands of protesting dealers. Indeed, defendants acknowledge that the Board has no control over the issuance of its prohibitory orders; such orders *must* issue upon the filing of a protest. (Defendants' Memo. pp. 44-45). Pursuant to the Act, the *only* persons who may invoke the injunctive power of the Board, and hence effectuate the deprivation, are existing automobile dealers who wish to enjoin the establishment or movement of an existing or potential competitor. Because the Board has no power to deny, and indeed must always grant a request for a prohibitory order, it is clear that the State has delegated its monopoly of legitimate force to private persons who utilize that force to their own advantage.

Similarly, there has been no demonstration—nor do defendants anywhere allege—that there is a "special need" for a prehearing deprivation in establishment or relocation cases. As noted in *Fuentes, supra* at 91-92, a "special need" arises *only when life, health or the very fabric of our society are threatened* (*i.e.*, protection of the public from contaminated food, from bank failures, from misbranded drugs, or to aid in the collection of taxes, or the war effort. 407 U.S. at 91-92). Certainly, such dire exigencies are not threatened by the proposal that the already licensed Muller dealership be moved from its present

antiquated and dilapidated facility to a newer facility some 2.2 miles away. Nor can there be "special need" to prohibit Fox, which is and has been for many years a licensed automobile dealership, from selling Buicks in addition to its other line-makes. Yet, the same form of summary deprivation utilized to protect the public from contaminated food is being employed to prevent the relocation of Muller and the inception of Buick sales by Fox.

Finally, it is clear that the relocation and establishment provisions of the Act cannot rise to the level of compelling public necessity present when the State charters a bank (public trust and prevention of fraud),* approves an airport site (public safety),** or issues a liquor license (control of a dangerous substance).*** There can be no equation between

*California banking legislation has resulted from ". . . years of observation of the intimate relation of banking with the business world, the disastrous consequences of unsound banking and the necessity for prompt measures for the protection of the public therefrom. It is generally recognized, as it is clearly obvious, that it is the duty of the state to its people who are dealing with banking institutions of a *quasi* public nature to see that protection to the public is afforded by the immediate abatement of such institutions as have become unsafe or insolvent and whose further continuance in business is a fraud upon and a menace to the public, and that danger can only be effectually averted by prompt action on the part of the state." *State Savings and Commercial Bank v. Anderson,* 165 Cal. 437 (1913); *aff'd per curiam,* 238 U.S. 611.

**Section 21666 of the California Public Utility Code makes it clear that safety is a fundamental requiremtn (sic) for the approval of airport sites.

***Alcoholic beverage licensing has long been predicated on the notion of controlling a dangerous substance. See, *Crowley v. Christensen,* 137 U.S. 86 (1889). See also, California Stat. 1953, Ch. 152, § 23001, p. 955, wherein the Legislature declares the control of alcoholic beverages to involve the well being and

actions to prevent fraud, control dangerous substances and insure physical safety in connection with airplanes, and the Board's prehearing injunction which bars Fox and Muller, who have already satisfied the State's test to insure their qualifications as automobile dealers, from selling Buicks or moving to a new facility 2.2 miles down the road.

It is respectfully submitted the Act's provisions for prehearing deprivations are in contravention of every constitutional test for due process enunciated by the Supreme Court and accordingly should not be allowed to endure.

IV. THE ESTABLISHMENT AND RELOCATION PROVISIONS OF THE ACT ARE INCONSISTENT WITH THE ECONOMIC POLICIES REFLECTED IN THE ANTITRUST LAWS OF THE UNITED STATES AND MUST THEREFORE BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE

Defendants' arguments concerning the antitrust ramifications of the Act, although lengthy, simply serve to confuse the issues before the Court on the instant motion. With respect to plaintiff's antitrust claim, only two basic questions need be answered:

(1) Do the establishment and relocation provisions of the Act result in a restraint on trade

safety of the State and its people "in the highest degree." Moreover, the States are afforded a great deal of latitude in this area by the Twenty-First Amendment to the United States Constitution.

inconsistent with and contrary to the mandate of the Sherman Act? and

(2) If so, are those provisions invalid under the Supremacy Clause?

In addressing these issues, it should be remembered that the antitrust claim advanced by the present Motion focuses solely on the provisions of the Act which permit existing automobile dealers automatically to bar the establishment of a new competitor or the relocation of an existing competitor simply by writing a letter of protest. Any antitrust ramifications that may flow from the Board's ultimate determination on the protest following notice and hearing are not now before the Court.

A. *The Establishment and Relocation Provisions of the Act Clearly Result in a Restraint on Trade Inconsistent with and Contrary to the Mandate of the Sherman Act*

It is well established, and defendants do not argue to the contrary, that horizontally imposed territorial restraints and market allocations constitute *per se* violations of the Sherman Act. *United States v. Topco*, 405 U.S. 596 (1972); *White Motor Co. v. United States*, 372 U.S. 253 (1963); *American Motor Inns v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975).

Despite defendants' contortious attempt to show the contrary, it is impossible legitimately to conclude that the restraints imposed by existing dealers ob-

taining automatic injunctions against the establishment and relocation of their present and potential competitors are imposed other than horizontally. Although the Board provides the mechanism of restraint, it is the existing dealers and *only* the existing dealers who have the power to invoke the automatic injunction. Simply put, absent a letter of protest, there is no automatic injunction and there is no restraint. The question in determining whether the restraint is imposed vertically or horizontally depends not upon an analysis of who commits the last act to effect the restraint but rather upon an analysis of who has the power to initiate and control the act. See *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *American Motor Inns, supra.*

Because the Board is devoid of any power to prevent the automatic injunction from issuing once a letter of protest is received, it is patently apparent that only those existing dealers who are at the same level of the market structure as the proposed new dealer and the dealer who decides to relocate, have the sole and unfettered power to initiate and control the injunctive restraint on competition.

Despite defendants' eight-page effort to dismiss the effect of *American Motor Inns, supra,* the facts of that case and the legal principles enunciated therein are simply not distinguishable from the instant case:

> "In the present case the district court found that [defendant] treated 'as a veto' the objections by its existing franchisees to [plaintiff's] application for a license at the Elizabeth location . . .

"By *thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the . . . market,* [*defendant*] *enabled its franchisees already in the . . . area to divide that market between themselves,* thus precluding further intrabrand competition. *Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act." American Motor Inns, supra* at 1242.

Moreover, when the Attorney General of the State of California was first constrained to comment upon the antitrust ramifications of the Act, he stated in a letter directed to a member of the California Assembly* that:

"Assembly Bill 225, [*the Act*]*, which has been reviewed by our legal staff, has an apparent anticompetitive effect upon the new car market.* Specifically, the bill requires an automobile manufacturer to notify each dealer in the same line-make in a given metropolitan area or community of its intent to establish or relocate an additional dealership in that area. Any single dealer may then file a protest with the New Motor Vehicle Board, which determines whether good cause for an additional dealership exists. The manufacturer has the burden of proof to establish good cause before the Board. In connection with this, he must establish that additional competition is required in the market area.

"The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition.

*Letter of August 3, 1973 from Evelle Younger, Attorney General of the State of California to Assemblyman Gonsalves. A copy of said letter is attached hereto as Exhibit A.

The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law.

"Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co. v. United States,* 372 U.S. 253 (1963). Likewise, territorial restrictions imposed by the manufacturer on dealers are *per se* violations. *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967)." (Emphasis added.)

It is respectfully submitted that the analysis of the Attorney General of the State of California in a non-litigation context is far more persuasive than the advocate analysis contained in defendants' Memorandum in Opposition to the Motion for Partial Summary Judgment.

Defendants' final effort to demonstrate that the relocation and establishment provisions of the Act are not blatantly anticompetitive is demonstrative of the futility of their position. At page 27 of their Memorandum, defendants state ". . . plaintiffs have proved neither the purpose of protesting franchisees to prevent competition, nor the existence of anticompetitive effect resulting from franchisee action." (Defendants' Memo. p. 27, lines 10-13). But the motives of the parties to a *per se* violation of the Sherman Act are irrelevant, and the anticompetitive effect of the violation is conclusively presumed. Moreover, the affidavits prove that plaintiff Fox has been totally barred from competing in the sale of Buicks

for 16 months *solely* as a result of an automatic injunction obtained by his would-be competitors and plaintiff Muller has for many months been precluded from relocating his business by his existing competitors. What more the defendants would require in the way of anticompetitive impact defies understanding.

Because the establishment and relocation provisions of the Act and the procedure for an automatic injunction which is an integral part thereof give rise to a *per se* violation of the Sherman Act, they must be found to result in a restraint on trade inconsistent with and contrary to the mandate of the Sherman Act.

B. *The Establishment and Relocation Provisions of the Act Are Invalid Under the Supremacy Clause*

Defendants argue that even if the anticompetitive scheme effectuated by the establishment and relocation provisions of the Act is inconsistent with and contrary to the national economic policy espoused in the Sherman Act, "[t]he acts of defendants undertaken pursuant to and in effectuation of the terms of the California Automobile Franchise Act do not violate the prohibitions of the Sherman Act." (Defendants' Memo, p. 32, lines 5-9). This argument misses the mark. The issue is not whether the anti-competitive acts of government officials are insulated from liability under the Sherman Act, but whether the *Act itself* is in conflict with federal law and therefore must give way under the Supremacy Clause.

The issue in this case is precisely the same issue that was decided by the Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). In *Schwegmann*, the State of Louisiana had enacted a law which permitted resale price maintenance agreements between distributors and retailers. In addition, the Louisiana statute provided that once any distributor and a single retailer had entered into such an agreement, any other retailer of the same commodity who had not entered into such an agreement but who sold or advertised the commodity at a price less than that specified in the agreement would be guilty of unfair competition and subject to suit.

Speaking for the majority, Justice Douglas observed that "[f]ixing minimum prices, like other types of price fixing, is illegal *per se*" and that "[t]he fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval of Congress." *Schwegmann, supra* at 386. Justice Douglas made it quite clear that absent a specific exemption from Congress, all aspects of the resale price maintenance scheme, both voluntary and involuntary, would be invalid under the Sherman Act, whether authorized by state statute or not.

> "It is clear from our decisions under the Sherman Act (26 Stat. 209) that the inter state marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it." *Ibid.*

However, in 1937 Congress had enacted the Miller-Tydings Act as an amendment to Section 1 of the Sherman Act. That amendment exempted from the

Sherman Act resale price maintenance agreements voluntarily entered into pursuant to state law, but did not extend the exemption to cover the enforcement of such agreements against those who had not signed a similar agreement. The Court thus concluded that only that portion of the Louisiana statute which permitted the enforcement of voluntary resale price maintenance agreements among the parties to such agreements escaped the preemptive power of the Sherman Act:

> "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts and agreement,' the inference is strong that Congress left the noncontracting group to be governed by preexisting law." *Schwegmann, supra* at 395

It should be noted that at the time of the Miller-Tydings amendment to the Sherman Act, several states, including California, had statutes authorizing resale price maintenance agreements. Had congress thought that such statutes were not preempted by the Sherman Act, there would have been no need to enact the Miller-Tydings amendment. As Justice Blackmun stated in *Cantor v. The Detroit Edison Company*, ... U.S. ....., 44 L.W. 5357, 5365-66 (July 6, 1976):

> "Congress itself has given support to the view that inconsistent state laws are pre-empted by the Sherman Act. Were it the case that state statutes held complete sway, Congress would not have found it necessary in 1937 to pass the Miller-Tydings Amendment. . . ."

Thus, *Schwegmann* stands for the proposition that, absent an express congressional intent to the contrary, state laws which conflict with the Sherman Act are invalid under the Supremacy Clause and are unenforceable.

Indeed, as evidenced in the 1975 repeal of the Miller-Tydings and McGuire Act amendments to the Sherman Act, Congress itself has expressly recognized that state fair trade laws, absent Congressional exemption, must give way to the Sherman Act, and so stated in Senate Report No. 94-466, 94th Cong. 1st Sess. (1975). After pointing out that fair trade laws ". . . are, in fact, legalized price fixing," the Senate Report states:

> "Fair trade laws permit a manufacturer to enter into an agreement with a retailer setting the minimum or stipulated price at which his product may be sold. California passed the first State law in 1931 and other States followed. *It became apparent, however, that any state law which applied to interstate commerce violated Federal antitrust laws.* Thus, in 1937, Congress passed the Miller Tydings Act granting State fair trade laws an exemption from the Sherman Antitrust Act." (Emphasis added.)

The above language leaves no room for doubt as to the Congressional intent that state laws inconsistent with the Sherman Act are subject to preemption.

In the present case, it has already been demonstrated that the challenged provisions of the Act result in a *per se* violation of the Sherman Act* just as the resale price maintenance agreements did in *Schwegmann*. There, the Louisiana statute permitted private parties to implement the illegal restraint through the state courts; in the present case the California statute permits private parties to implement the restraint through the device of an automatic injunction obtained from the Board. But, in the present case there is no evidence of any intent on the part of Congress to exempt horizontal territorial and market allocations among franchised new car dealers from the purview of the Sherman act, pursuant to state statute or otherwise. In fact, as is conclusively shown by the "Dealers' Day in Court Act," 15 U.S.C. §§ 1221-1225, the contrary is true.

The Dealers' Day in Court Act provides for federal regulation of the franchising of new car deales (sic) by manufacturers. This act, which was expressly designed by Congress as an adjunct to the Sherman Act** specifically provides in Section 1224 that:

> "No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any

*See Part V.A. of this Memorandum, *supra*.

**See, *Schnable v. Volkswagen of America, Inc.*, 185 F. Supp. 182 (D. Iowa 1960).

> provision of the antitrust laws of the United States."

Moreover, in the House Report accompanying that legislation, Congress expressly stated that *any curtailment* of the right to appoint added dealers in an area is inconsistent with the antitrust objective of the statute. H.R. Rep. No. 2850 84th Cong., 1st Sess. (1956). Thus, to the extent any specific legislative expression is required to demonstrate that Congress did not intend to immunize state laws which permit and encourage *per se* violations of the antitrust laws from the preemptive effect of the Sherman Act, the Dealers' Day in Court Act provides that expression.

The recent decision in *Cantor v. Detroit Edison Company, supra* confirms the applicability of *Schwegmann* to the instant case. In *Cantor*, Justice Stevens, speaking for the plurality, expressly rejected the notion that where state law is inconsistent with the federal antitrust law "the federal interest must inevitably be subordinated to the State's." 44 L.W. at 5362. However, because the plurality concluded that the Michigan regulatory scheme did not conflict with federal antitrust policy it found it unnecessary to address the preemption question. 44 L.W. at 5363.

Justice Blackmun, however, found the principal question in *Cantor* to be "the Sherman Act's preemptive effect upon inconsistent state laws" and "one of Congressional intent." Id. at 5365. Thus, Justice Blackmun's concurring opinion of is the most enlightening on the issue raised in the present case. In

that opinion, the Justice persuasively demonstrates that "the Sherman Act generally preempts inconsistent state laws." 44 L.W. at 5366. Although Justice Blackmun concedes some difficulty in establishing an uncompromising rule by which the courts could determine just which state laws are preempted by the Sherman Act and those which are not, it is respectfully submitted that where the state statute places in the hands of private citizens the power unilaterally to invoke the process of the state to accomplish *per se* violations of the Sherman Act, the state law is so dramatically at odds with the federal policy that the state statute must give way. As the Court said in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); "No State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress." 193 U.S. at 350.

Defendants' reliance on *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), reh. den. 384 U.S. 967, is misplaced. *Seagram* involved a number of constitutional challenges, one of which rested on the Supremacy Clause, to a New York statute requiring distillers to file their monthly price schedules for sales to wholesalers and retailers together with an affirmation that such prices were "no higher than the lowest price" at which sales were made by the distiller or a "related person" anywhere in the United States for the preceding month. 384 U.S. 35, 40 (1965). The term "related person" comprehended

wholesalers doing a substantial part of their business in Seagram brands. Thus, under Section 9 of the New York Act:

> ". . . before a 'related person' wholesaler may sell a particular brand of liquor to a New York retailer, he must secure an affirmation from the brand owner or his agent that the price charged by the wholesaler is no higher than the lowest price at which the brand was sold to any retailer in any other part of the country by any wholesaler doing 'substantial' business with the brand owner. Thus, a brand owner doing business in New York must keep himself informed of the prices charged by all 'related persons' throughout the United States." 384 U.S. 35, at 40-41.

Appellants in *Seagram* contended that this simple reporting provision, and the collection of price information necessitated thereby, was inconsistent with the federal antitrust laws, specifically the Sherman Act, and Section 2 of the Clayton Act as amended by the Robinson Patman Act, 15 U.S.C. § 13. In rejecting this contention, the Court pointed out that:

> "The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act." 384 U.S. 35 at 45.

Thus, the New York statute, standing alone, did not have any anticompetitive effect nor did it purport to permit anticompetitive acts. In order to effect any Sherman Act violation in connection with the Section 9 compilations, private person would have to take

action *beyond the parameters of the statute* by combining or conspiring to misuse the price information. The Court was careful to point out that this second step would not be insulated from the antitrust laws.

In contrast, Vehicle Code § 3062 requires no second step. The anticompetitive injunction is obtained pursuant to the express statutory language which mandates that a prohibitory order issue upon the filing of a protest. Once that order has issued, a *per se* violation of the Sherman Act has occurred; nothing more is required.

Likewise, defendants' reliance on *Parker v. Brown,* 317 U.S. 341 (1942) is misplaced. Although *Parker* has been cited in support of varying positions over the last 35 years, *Cantor, supra* puts *Parker* in its proper perspective. As Justice Stevens points out, *Parker* was solely concerned with the legality of the conduct of state officials charged by law with the responsibility for administering California statute. 44 L.W. at 5363. The distinction between the *Parker* issue and the issue in this case is made apparent by Justice Stevens' statement that "[e]ven if the state program had been held unlawful, such a holding would not necessarily have supported a claim that private individuals who had merely conformed their conduct to an invalid program had thereby violated the Sherman Act." 44 L.W. at 5364. Thus the issue of whether a state statute must fall under the Supremacy Clause because it is inconsistent with the Sherman Act and the issue of whether state officials and private citizens acting in accordance with the

state law can be held liable under the Sherman Act for their conduct present distinctly different issues. *Schwegmann, supra* deals with the first issue and that is the issue in this case. *Parker* deals with the second issue and that is *not* the issue in this case.

VI. CONCLUSION

As has been demonstrated in the foregoing discussion, the relocation and establishment provisions of the Act violate the fundamental requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; said provisions also operate in direct contravention of the national economic policy reflected in the antitrust laws and made paramount by the Supremacy Clause. For these reasons, it is respectfully submitted that the Court should declare those provisions of the Automobile Franchise Act unconstitutional and should enjoin their implementation and enforcement.

Dated: August 18, 1976

Respectfully submitted,
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By Robert W. Culver

Exhibit A

Letterhead of
State of California
Office of the Attorney General
Department of Justice
State Building, Los Angeles, 90012

August 3, 1973

Honorable Joe A. Gonsalves
Member of the Assembly
State Capitol
Sacramento, CA 95814

RE: Assembly Bill 225 (as amended June 5, 1973)

Dear Assemblyman Gonsalves:

We are writing to express our concern over those portions of Assembly Bill 225 which would, in part, create an implied exemption for new-car dealers to the Cartwright Act, the State antitrust law.

Assembly Bill 225, which has been reviewed by our legal staff, has an apparent anticompetitive effect upon the new car market. Specifically, the bill requires an automobile manufacturer to notify each dealer in the same line-make in a given metropolitan area or community of its intent to establish or relocate an additional dealership in that area. Any single dealer may then file a protest with the New Motor Vehicle Board, which determines whether good cause

for an additional dealership exists. The manufacturer has the burden of proof to establish good cause before the Board. In connection with this, he must establish that additional competition is required in the market area.

The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition. The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law.

Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co. v. United States,* 372 U.S. 253 (1963). Likewise, territorial restrictions imposed by the manufacturer on dealers are *per se* violations. *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967). Many cases hold that decisions under the Sherman Act are applicable to problems arising under the State Cartwright Act.

In pointing out these problems, we should also make it clear that we are not opposing the very desirable portions of Assembly Bill 225 which provide for safeguards to dealers, and, ultimately, consumers, in the implementation of vehicle warranties.

The anti-competitive aspects of Assembly Bill 225, however, force us to take a position of opposition. The purpose of the Cartwright Act to insure competitive conditions in the public interest would not be served by the bill in its present form.

If we can be of any assistance to you in this matter, please feel free to call on us.

Very truly yours,
/s/ Evelle J. Younger
Evelle J. Younger
Attorney General

(Affidavit of Service omitted in printing)

United States District Court
Central District of California

No. CV 76-1200-WPG

[Title omitted in printing]

PLAINTIFFS' REPLY TO INTERVENORS' ANTITRUST AND ABSTENTION ARGUMENTS

Intervenors Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California have submitted memoranda in opposition to plaintiffs' motion for partial summary judgment* and in support of defendant New Motor Vehicle Board's motion to dismiss on the ground of abstention.** Although intervenors' arguments are simplistic, the Court should not find them persuasive. For the most part, plaintiffs' Memorandum in Reply to Defendants' Opposition to the Motion for Partial Summary Judgment (filed August 18, 1976) should suffice to rebut intervenors' arguments. However, certain aspects of the intervenors' memoranda merit separate response.

*Intervenors' Opposition to Plaintiffs' Motion for Partial Summary Judgment, dated August 4, 1976 (hereafter "Intervenors' Antitrust Memo").

**Intervenors' Memorandum in Support of Defendants' Motion To Dismiss, dated August 4, 1976 (hereafter "Intervenors' Abstention Memo").

I. INTERVENORS' AUTHORITIES DO NOT REBUT PLAINTIFFS' CLAIM THAT THE AUTOMOBILE FRANCHISE ACT CONFLICTS WITH THE FEDERAL ANTITRUST LAWS.

A. *Preemption*

Intervenors argue that the Dealers Day in Court Act, 15 U. S. C. §§ 1221-1225 (hereinafter "Dealers Act"), rather than being evidence of specific congressional intent to insure the full application of the Sherman Act to matters involving the interstate franchising of new car dealers by manufacturers, constitutes an unfettered license whereby the states may emasculate the Sherman Act. The sole basis for this argument is Section 1225 of the Dealers Act, which provides that, absent a conflict with one of its provisions, the Act itself does not invalidate state laws.

It is not necessary to go beyond the fact of the statute itself to demonstrate the failure of intervenors' argument. In Section 1224 of the Dealers Act, Congress expressed its intention in absolute terms: *"No provision* of this chapter shall repeal, modify, or supersede, *directly or indirectly,* any provision of the antitrust laws of the United States." Section 1225, upon which intervenors rely, is a provision of the Dealers Act and therefore must be subject to the clear limitations of Section 1224.

Thus it is clear that although Congress intended to preserve the *existing* power of the states to engage in some regulation of the franchise automobile business, it is equally clear that Congress intended to dispel

any notion that the Dealers Act in any way expanded upon that power. Simply put, intervenors' argument that Section 1225 serves as an escape hatch from the preemptive effect of the Sherman Act and the Supremacy Clause fails. At the time the Dealers Act was enacted, that hatch was closed, and in Section 1224 of the Act Congress made clear its intent to keep it closed.

B. *Intervenors' Argument With Respect to "State Action" Addresses the Wrong Issue.*

Intervenors concede "the obvious point that a law creating a state board may be invalidated because the subject matter of the law has been preempted by federal legislation pursuant to the Supremacy Clause." (Intervenors' Antitrust Memo, p. 4.) In so doing, intervenors have unwittingly identified the issue crucial to plaintiffs' antitrust claim: namely, whether the establishment and relocation provisions of the Act and the automatic injunction procedure integral to those provisions, all of which directly conflict with the mandate of the Sherman Act, are invalidated under the Supremacy Clause. Neither intervenors' arguments nor the case which they cite address that fundamental issue.

There was no challenge to a state statute on supremacy grounds or otherwise in *State of New Mexico v. American Petrofina, Inc.,* 501 F.2d 363 (9th Cir. 1974). In that case, Shell Oil Company claimed that New Mexico and some of its political subdivisions had conspired as consumers to fix the price of asphalt and to eliminate competition among themselves in violation of Sections 1 and 2 of the Sherman Act. Thus the sole question presented in *American Petrofina* was whether the state is immunized from antitrust *liability* under the Sherman Act. The court correctly held that the state is immunized from *liability,* but that holding has nothing to do with the question of whether state laws which are in direct conflict with the mandate of the Sherman Act are invalid under the Supremacy Clause.

Whitten v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970) *cert. denied,* 400 U. S. 850 (1970), likewise has nothing to do with preemption and the Supremacy Clause. Instead, because the state statute involved in *Whitten* required competitive bidding, the court found the statute affirmatively consistent with the aims of the Sherman Act. 424 F.2d at 31. Thus, the issue in *Whitten* was not whether the state statute was invalid under the Supremacy Clause but whether a private person (Paddock Pools) could be subject to liability under the Sherman Act for engaging in predatory practices and conspiracy to exclude or deter others from the competitive bidding mandated by the state statute. Obviously that is not the issue in the present case.

Cantor v. The Detroit Edison Company, ... U.S. ....., 44 U.S.L.W. 5357 (July 6, 1976) adds nothing to intervenors' position. To the contrary, as has been shown in plaintiffs' Reply to Defendants' Memorandum in Opposition to the Motion for Partial Summary Judgment, *Cantor* affirms the principle that the issue of *liability* under the Sherman Act and the issue

of *invalidity* under the Supremacy Clause of state statutes in conflict with the Sherman Act, are two distinctly unique questions which require equally distinct analysis and determination.

II. THIS COURT SHOULD NOT ABSTAIN FROM DETERMINATION OF PLAINTIFFS' FEDERAL CONSTITUTIONAL CLAIMS.

A. *The Existence of State Civil Litigation Involving Other Issues and Other Parties Does Not Justify Abstention.*

Intervenors argue that this Court should abstain under the doctrine of *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941) because a California Court of Appeal may, in unidentified existing litigation, declare the Automobile Franchise Act unconstitutional under the Due Process Clause of the California Constitution. (Intervenors' Abstention Memo, pp. 2-3.)

Intervenors appear to refer to *American Motors Sales Corp. v. New Motor Vehicle Board,* a case now on appeal from a decision of the Sacramento County Superior Court. As plaintiffs explained in their Memorandum in Opposition to Defendants' Motion To Dismiss (filed June 8, 1976), that case involves an issue—the validity of the Board's composition—not presented by the motion for partial summary judgment now before this Court. Moreover, none of the plaintiffs in this action are parties to the *American Motors* litigation. To suggest, as intervenors apparently do, that the existence of state litigation involving *other parties* and *other issues* somehow calls for *Pull-*

man-type abstention, is to replace legal argument with wishful thinking.

Plaintiffs' previous memorandum demonstrated that abstention under the *Pullman* doctrine is appropriate only when the challenged state statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Harman v. Forssenius,* 380 U. S. 528, 534-35 (1965). Abstention is not warranted simply because the Automobile Franchise Act might have been challenged under the state constitution in state court, and intervenors' argument to the contrary is expressly foreclosed by the Supreme Court's recent decision in *Examining Board of Engineers v. Flores de Otero,* ..... U. S. ....., 44 U.S.L.W. 4890 (June 17, 1976). Appellants in that case contended that the federal district court should have abstained from determining the validity of a Puerto Rico professional licensing statute under the United States Constitution because the statute might be invalid under the Puerto Rico Constitution. The Supreme Court disagreed, and held that:

> "[T]he abstention issue seems clearly controlled by *Wisconsin v. Constantineau,* 400 U. S. 433 (1971), where, as it was said in *Harris County,* 420 U. S., at 84-85, n. 8, 'we declined to order abstention where the federal due process claim was not complicated by an unresolved state law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution.'" (44 U.S.L.W. at 4898.)

B. *The Doctrine of Mandatory Abstention Expressed in Younger v. Harris Is Totally Inapplicable to This Case.*

Intervenors argue that the doctrine of mandatory abstention under *Younger v. Harris,* 401 U.S. 37 (1971) must be applied to this case because General Motors and the New Motor Vehicle Board are both parties to state civil litigation in which General Motors' federal constitutional claims could be raised. (Intervenors' Abstention Memo, pp. 4-10). This argument, however, is based upon a fundamental misunderstanding of both *Younger,* its progeny and the pending state civil action to which intervenors refer.

The plaintiff in *Younger* was indicted in state court for violation of California's Criminal Syndicalism Act. He brought suit in federal court for an injunction against the state prosecution, on the ground that the Act was unconstitutional. A three-judge district court agreed and issued an injunction. On appeal, the United States Supreme Court reversed. The Court's holding was based on the principle that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief"; and on the notion of "comity," which requires the federal government "anxious though it may be to vindicate and protect federal rights and federal interest, . . . to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. at 43-44.

Only this year the Supreme Court has definitely held that *Younger* type abstention applies only to state criminal proceedings, nuisance proceedings antecedent to a criminal prosecution, and proceedings concerning collection of taxes. *Colorado River Water Conservation District v. United States,* 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976). The cases utilized by intervenors are either consistent with this holding or totally inapposite.

In *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975), the Supreme Court held that the federal courts should refrain from interfering with a public nuisance action that was antecedent to a criminal prosecution (pornography).* *Duke v. Texas,* 477 F.2d 244 (5th Cir. 1973) and *Lynch v. Snepp,* 472 F.2d 769 (4th Cir. 1973) were both "quasi-criminal" cases very much like *Huffman* in which the federal plaintiffs sought protection from contempt proceedings to enforce injunctions obtained by state officials. Finally, *Cousins v. Wigoda,* 463 F.2d 603 (7th Cir. 1972) was not an attempt to enjoin enforcement of a state statute, but rather an attempt by the defendant in the state action to obtain a federal injunction to interfere with the prosecution against the continuance of the state action which had earlier been removed to federal court and then remanded for lack of jurisdiction. The court of appeals correctly determined that the mere existence

*Although intervenors utilize a quote from the 1972 pocket part of Wright, *Law of Federal Courts* (2d ed. 1970) to suggest that Chief Justice Burger and Justices White and Blackmun are ready to extend *Younger* to all civil cases, they neglect to inform the Court that three years later those same Justices joined in the Court's carefully limited opinion in *Huffman v. Pursue, Ltd., supra.*

of a prayer for relief in the state court proceeding which, if granted, might violate the federal plaintiff's constitutional rights, absent any showing that those rights would not be protected in the state proceeding, did not justify federal injunctive relief.

Intervenors cite "Phillips v. Osborne, 483 Fed. 1074 (9th Cir. 1971)" for the proposition that the Ninth Circuit has extended *Younger* to all civil actions in state courts. However, the case that appears at 483 F.2d 1074 is a 1973 Ninth Circuit decision entitled *Garfinkle v. Wells Fargo Bank,* which has nothing to do with *Younger. Younger* is cited in *Phillips v. Osborne,* 444 F.2d 778 (9th Cir. 1971), but the court's holding in that case was simply that issues presented in pending state litigation were not foreclosed by a prior federal judgment.

In any event, the present situation is quite different from *Younger* and the related cases discussed above. Although General Motors has appeared as real party in interest in the state civil proceeding referred to by petitioners, *Becherer Buick, Inc. and O'Donnell Buick-Opel, Inc. v. New Motor Vehicle Board* (Sacramento County Superior Court. No. 256 856), none of the constitutional issues involved in the present federal action have been raised or decided in that state court case, and there is no reasonable likelihood that they ever will be.

The *Becherer* case is nothing more than a discovery matter which began as a petition by two dealers who have protested the establishment of a Buick-Opel franchise in Pasadena, California for a writ of man-

date compelling the New Motor Vehicle Board to issue subpoenas for certain depositions in advance of the administrative hearing on the protests filed by Becherer and O'Donnell. The Sacramento County Superior Court decided that the New Motor Vehicle Board is totally without power to issue subpoenas for prehearing discovery depositions, and Becherer and O'Donnell have appealed.

Whatever, the final determination may be in that matter, it will turn principally upon an interpretation of various provisions of the California Government Code pertinent to discovery in administrative proceedings. That is an issue totally foreign to the instant case.

C. *There are No Grounds for Dismissal on the Basis of Conserving Judicial Resources*

In arguing that the policy in favor of conserving judicial resources discussed in *Colorado River Water Conservation District v. United States,* 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), requires dismissal of the matter now before this Court, intervenors demonstrate a fundamental misunderstanding of the Supreme Court's pronouncements. Intervenors also misstate the facts concerning the participation of General Motors in other state litigation.

As has been repeatedly noted in this memorandum, General Motors is not a party to any other pending state litigation involving the Board except the *Becherer* discovery matter; the irrelevancy of that proceeding to any of the issues now before this Court

has already been demonstrated. Indeed, intervenors, in the portion of their memorandum devoted to a discussion of *Younger v. Harris, supra,* premise their argument on the notion that while General Motors did not bring its federal constitutional claims to a state court, it should have done so. It is therefore surprising to find that intervenors, having extensively discussed the *Becherer* matter on pages 4 and 5 of their memorandum, can then assert on page 12 of that same document that ". . . GM [is] currently participating in state court proceedings in which the *identical issue is being litigated* . . .". (Intervenors Abstention Memo, o. 12, lines 5-6; emphasis added.) This is simply erroneous.

Intervenors' analysis of the teachings of *Colorado River Water Conservation District v. United States, supra,* is equally incorrect. The Court's utilization of the "wise judicial administration" rationale was made possible by the fact that the Court expressly found "no federal constitutional issue for decision." 47 L.Ed. 2d at 496. Because there was no need to consider principles concerning proper constitutional adjudication—principles that command the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" 47 L.Ed.2d at 498—the Court was able to apply different criteria. In so doing, the Court repeatedly made it clear that only the most "exceptional" of circumstances and the "clearest of justification" would warrant a "judicial administration" dismissal. The Court found that exceptional circumstance in the McCarran Amendment, 43 U.S.C.

§666, which the Court held to be a clear expression of a Congressional intent with respect to the proper manner of adjudicating water rights in a river system. It was this "most important" factor that warranted dismissal. 47 L.Ed.2d at 499.

In the matter now before this Court, the clear expression of Congressional intent in 28 U.S.C. §1331 (a), 1337 and 1343(3), compels the conclusion that plaintiffs are entitled to a federal forum for resolution of their federal constitutional claims:

> "Congress [has] imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler v. Koota,* 389 U.S. 241, 248 (1967).

III. CONCLUSION

For all the reasons set forth above, this Court should deny the Motion to Dismiss and should consider and adjudicate the federal constitutional claims presented by plaintiffs' Motion for Partial Summary Judgment.

DATED: August 19, 1976.

Respectfully submitted,
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Attorneys for Plaintiff
General Motors Corporation

(Affidavit of Service omitted in printing)

United States District Court
Central District of California

No. CV 76-1200-WPG

[Title omitted in printing]

SUPPLEMENTARY AFFIDAVIT OF JOHN MULLER

State of California
County of Los Angeles—ss.

JOHN MULLER, being duly sworn according to law, deposes and says:

1. I am the President and principal shareholder of Muller Chevrolet, 3701 Oceanview Boulevard, Montrose California, one of the plaintiffs in this matter.

2. As I stated in my Affidavit in Support of the plaintiff's Motion for Partial Summary Judgement in this matter, I realized, soon after acquiring my dealership in October of 1973, that the physical facility at 3701 Oceanview Boulevard was totally inadequate to house an automobile dealership, particularly with respect to providing repair service for the owners of Chevrolet cars and trucks. I thereafter spent more than two years seeking out, and reaching an agreement for the acquisition of, a facility that would accommodate my needs and the needs of the public. Although I found such a facility at 475 Foothill Boulevard in La Canada, some 2.2 miles from my present dealership site, my attempts to relocate there

were blocked when two of my competitors filed protests and the New Motor Vehicle Board issued an order prohibiting the move.

3. Because I was concerned that I could not hold together for an indefinite period my arrangement concerning acquisition of the proposed facility, I asked my attorney Norin Grancell, to take all the steps necessary to expedite the administrative proceedings and to challenge the statutes that permitted my competitiors to obtain a prehearing injunction prohibiting the relocation of my business.

4. The prohibitory order of the New Motor Vehicle Board was dated February 6, 1976. The hearing on the merits of the protests against my relocation did not begin until August 2, 1976. In the more than six month interim, I expended a great deal of time and effort in attempting to maintain my arrangements with Continental Financing Company, the owner of the property to which I intended to relocate my dealership. Representatives of Continental Financing, however, advised me that they could not insure that the facility at 475 Foothill Boulevard would remain available for an indefinite period.

5. On or about August 20, 1976, I was informed by Mr. Grancell that a proposed decision had been rendered by the Administrative Law Judge who had heard the protests concerning my dealership, and that the judge had found good cause existed to permit the relocation. I was futher advised, however, that this decision was not final and that, under the appropriate Vehicle Code sections, the New Motor Vehicle Board

could approve or reject the proposed decision and could even reopen the entire matter. Thus, Mr. Grancell informed me, it would be necessary to wait an additional thirty days before the proposed decision, in the absence of action by the New Motor Vehicle Board, would become final.

6. On or about September 14, 1976, just as the thirty-day waiting period was about to end, I was informed by representatives of Continental Financing Company that the facility at 475 Foothill Boulevard was no longer available for occupancy by my dealership.

7. Because the long struggle in connection with the New Motor Vehicle Board's injunction has caused my business to incur substantial legal expenses, and because the goal to be achieved thereby—i.e., moving to the facility in La Canada—cannot now be attained, I have instructed my attorney not to engage in any further activities that would result in additional legal fees, including an appearance before this Court on Monday, September 20, 1976.

8. However, while I cannot at the present time accept the financial burden of additional legal expenses, the Vehicle Code provisions that would permit a recurrence of the events described herein represent a real and continuing threat for the future. My dealership facility remains in the same antiquated and inadequate condition I described in my Affidavit in Support of the Motion for Partial Summary Judgment in this matter. The roof continues to leak, the lease on my showroom facility will soon expire, and

I am still forced to turn away service customers because the dealership cannot physically accommodate all of the cars and trucks brought in for repair. Thus, I must once again attempt to relocate. If the automatic injunction provisions of the Vehicle Code remain in effect, the same competitiors who blocked my relocation in this instance would retain the power to similarly prevent any future attempt on my part; the only effort that would be necessary would be for those competitiors to simply send a letter of protest to the New Motor Vehicle Board.

/s/ John Muller
John Muller

(Jurat omitted in printing)

(Affidavit of Service omitted in printing)

Supreme Court of the United States

No. A-451

New Motor Vehicle Board of
the State of California,
Appellant,

vs.

Orwin W. Fox Co., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the injunction entered October 19, 1977 by the United States District Court for the Central District of California, case No. CV 76-1200 be, and the same is hereby, stayed pending the timely filing and final disposition of an appeal in the above-entitled case in this Court.

IT IS FURTHER ORDERED that pending determination of said appeal, all orders required by California Vehicle Code section 3066, subdivision (a), fixing the times and places of hearings upon protests against relocation or establishment of dealerships shall be issued and served by appellant New Motor Vehicle Board concurrently with the notification

required to be made by the Board to the franchisor under the California Vehicle Code section 2062.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 6
day of December, 1977

A true copy Michael Rodak, Jr.
Tort:

Clerk of the Supreme Court of the United States
By Francis J. Cotton
Deputy